

# European methods of administrative law redress:

Netherlands, Norway and Germany

**Trevor Buck**  
**University of Leicester**

DCA Research Series 2/04  
November 2004

**European methods of administrative law redress:**  
Netherlands, Norway and Germany

Trevor Buck  
University of Leicester

Prepared for the Department for Constitutional Affairs

September 2004

The Research Unit, Department for Constitutional Affairs, was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.

### **Crown Copyright 2004.**

Extracts from this document may be reproduced for non-commercial purposes on condition that the source is acknowledged.

First Published 2004

**ISBN 1 84099 055 4**

### **The author**

**Trevor Buck** is a Senior Lecturer in the Faculty of Law, University of Leicester. He teaches constitutional and administrative law, family law, and social security law. He has research interests in public law, social welfare and family law. Trevor has managed a number of empirical socio-legal research projects and is the author of *The Social Fund: Law and Practice*, a specialist social security text. He is currently writing two books *International Child Law* and *Making Social Security Law*.

For further details, see <http://www.le.ac.uk/law/staff/tgb1.html>

### **Disclaimer**

The views expressed are those of the authors and are not necessarily shared by the Department for Constitutional Affairs.

# Contents

	Page
<b>Executive Summary .....</b>	<b>i</b>
The Netherlands .....	i
Norway .....	ii
Germany .....	iii
European institutions .....	iii
 <b>1. Introduction .....</b>	 <b>1</b>
The context of the Report .....	1
Administrative law remedies .....	2
 <b>2. Netherlands .....</b>	 <b>5</b>
i. Overview of court system / administrative justice .....	6
<i>The General Administrative Law Act 1994 (hereafter 'GALA 1994').</i> .....	6
ii. Ombudsman schemes .....	14
iii. Alternative Dispute Resolution (ADR) .....	15
<i>Arbitration</i> .....	15
<i>Binding Advice</i> .....	16
<i>Mediation</i> .....	16
 <b>3. Norway .....</b>	 <b>22</b>
i. Overview of court system/administrative justice .....	22
ii. Ombudsman schemes .....	27
iii. Alternative Dispute Resolution – the proposed 'Dispute Act' .....	30
<i>Out-of-court procedures</i> .....	30
<i>Conciliation Boards</i> .....	31
<i>In-court mediation</i> .....	33
 <b>4. Germany .....</b>	 <b>37</b>
i. Overview of court system / administrative justice .....	37
<i>Judicial control</i> .....	37
<i>Administrative self-regulation</i> .....	39
ii. Ombudsman schemes .....	41
iii. Alternative Dispute Resolution (ADR) .....	42
 <b>5. Europe .....</b>	 <b>45</b>
i. European Union .....	45
<i>European Commission's Green Paper</i> .....	46
ii. Council of Europe .....	49
<i>Recommendation on family mediation</i> .....	49
<i>Recommendation on alternatives to litigation between administrative authorities and private parties</i> .....	50
iii. Europe and the ombudsman principle .....	52
 <b>6. Concluding observations .....</b>	 <b>55</b>
 <b>Bibliography .....</b>	 <b>57</b>

## Tables

	Page
<b>1</b> Administrative cases disposed by judgement: Netherlands (1990-2002) ...	<b>13</b>
<b>2</b> Disputes dealt with by conciliation boards (1980-2002): Norway .....	<b>23</b>

## Figures

<b>1</b> The organisation of applications for review and appeals in administrative law cases in the Netherlands .....	<b>9</b>
<b>2</b> Organisation of Courts in Germany .....	<b>38</b>
<b>3</b> Administrative Self-Regulation .....	<b>40</b>

## Executive Summary

This Report examines the profile of administrative law remedies in the Netherlands, Norway and Germany and makes some observations about the activities of regional European institutions in this field. For each jurisdiction the Report provides an overview of the administrative law system and court structure, an outline of the ombudsmen schemes and the significant developments in Alternative Dispute Resolution (ADR). The government's recent White Paper (2004) has presented some new ideas about how to proceed with the key tasks of preventing and resolving disputes in administrative justice. This Report provides an opportunity to reflect on some of the European approaches that may be able to shed some light on the direction and management of such reforms.

### The Netherlands

The implementation and development of the General Administrative Law Act 1994 (GALA 1994) has been a milestone in European administrative law technique. The legislation provides a comprehensive framework to regulate matters of principle, but there is also a generous area of freedom for the details of administrative remedies and their procedures to be developed and further customised to their context. The relative success in the Netherlands in avoiding unwanted increases in formal litigation derives from having, according to one authoritative commentator, 'a plurality of institutions' offering informal alternatives, coupled with the appropriate provision of a number of 'exit' opportunities within court procedures (Blankenburg, 1999:449). There is a strong tradition in Dutch legal culture to hear complaints informally and, consistent with that culture, specific methods have developed. Recent empirical research, replicating the work of Genn (1999) and Genn and Paterson (2001), appears to confirm the relative unwillingness of Dutch citizens to resolve their 'justiciable' problems by going to a court or tribunal (van Velthoven, ter Voert and van Gammeren-Zoeteweij, 2004).

The 'notice of objection' procedure (internal review by the administration) under GALA 1994 is worthy of more detailed research, as it provides a legislative template for a truly 'preventive' dispute technique. It also implicitly acknowledges the value to the administration of taking such internal review activity seriously. A comprehensive requirement for an administrative agency to review its own decision has much to recommend it; such activity can be utilised as a *resource* for the administration to improve services rather than being seen as an *irritant* to administrative efficiency. The pervasive

influence of Dutch legal culture to remain open to informal complaints can also be seen in the development of the office of National Ombudsman that has favoured early intervention in disputes. The development of mediation in the Netherlands commenced in the private sector and has more recently been taken up in the public sector. Experiments in out-of-court and in-court mediation have taken place. There has also been a pattern developing, in favour of the adoption of ADR, in particular *policy sectors*, i.e. in family, labour, and commercial disputes. That pattern is broadly replicated in many other European jurisdictions. The gravitation of ADR techniques around family, labour, consumer and commercial disputes suggest that it might be more important to look at *the benefits of ADR for these particular sectors* rather than attempt to produce a general coherence in remedial systems but at the expense of sectoral requirements. Some of the well-documented benefits of ADR have obvious applications in particular areas, for example, its 'relationship-saving' quality is particularly appropriate in family and neighbour disputes.

## **Norway**

Norwegian legal culture does not favour a ready recourse to courts, and as a result, they have developed a number of quite accessible *intra*-administrative remedies, e.g. the general right of 'appeal' to an immediately superior administrative authority. In Norway, the first-tier 'conciliation boards' provide an interesting model of the way in which the judicial power and mediation methods can be combined. However, on closer inspection, it would appear that few cases (around 3%) are in fact conciliated or mediated under this system. The existence of a strong Ombudsman figure provides a further explanation to the cultural resistance to litigation in the courts. Indeed, it is thought that the existence of the Ombudsman has prevented altogether the need for the development of a specialist tribunal sector. Norway is also looking at a radical change in its civil procedure rules with the imminent enactment of a 'Dispute Act'. The proposed Act has a number of ADR features built into its structure. Whether the proposals to revitalise the first-tier conciliation boards, into a swift, simple and inexpensive system will come to anything will be awaited with great interest. The proposed Dispute Act contains some valuable material demonstrating how the range of mediation techniques (non-judicial, judicial, in-court and out-of-court), can be integrated into a more comprehensive and rational civil procedure system. It will be beneficial to keep track of how this new legislation is implemented and with what results. There has clearly been much thought and effort applied in Norway to the problems faced by most of Europe's civil justice systems. But it is worth recalling Bårdsen's (2002) cautionary note that ADR must not become the 'poor man's justice', it

should be integrated with the other methods of administrative justice to achieve more accessible and timely justice overall.

## **Germany**

There is a clear distinction between 'judicial control' and 'administrative self-regulation'. Both forms of control are highly structured. The latter contains an interesting 'objection' procedure, which can be best described as a combination of an internal administrative review with a pre-trial process. The reported success rate (90%) of 'objections' (*Widerspruch*) demonstrates the possible practical benefits. Germany has no real equivalent to the parliamentary and local government ombudsman schemes found elsewhere in Europe. There has been a relatively recent development of the ombudsman principle, appearing in the private sector, in relation to banking services which has gained public support. Equally, Germany has also been a relative newcomer to mediation. Litigation and arbitration were the preferred German methods of administrative law redress. Again, factors in German legal culture can explain to an extent these developments. Civil litigation was widely regarded as a sufficiently robust and efficient form of dispute resolution. German citizens have high regard generally for the independence and skill of the judiciary. The breakthrough in ADR developments occurred only in 1999 when a Federal law introduced mandatory, court-annexed mediation in certain specified cases and subject to a number of exceptions. Early signs from the Bavarian State's implementation of this law are that an over-legalistic approach has been taken, putting in jeopardy the successful delivery of some of the well known benefits of mediation. Nevertheless, it is thought that the Federal law has prompted some changes in legal culture that will in the long term favour a more positive regard for mediation techniques.

## **European institutions**

Some commentators are starting to perceive a common European administrative law gradually taking shape, not only as a consequence of the *direct* reception of Community law into national legal orders but also as a result of its *indirect* reception (Widdershoven, 2002). The European Commission has provided a stimulus for Member States to continue a serious consideration of ADR – see its Green Paper (2002). It has also identified three policy areas of greater significance at the EU level: consumer protection, family and labour law. There are ongoing developments, in particular supporting the strong EU policy aim to enhance consumer confidence in electronic commerce through new developments in 'online dispute resolution' (ODR). Even in areas traditionally left to



the competence of individual Member States, such as family law, the EU is starting to show a number of new initiatives. A question posed by the Green Paper (2002) is whether future activity will be guided by a global or sectoral approach. Whichever the approach, it is likely there will be political resistance in the EU to any over-regulation of ADR methods in civil disputes.

The Council of Europe has also been an active provider of 'soft law' initiatives on ADR. In particular its *Recommendation* in 2001 (alternative to litigation between administrative authorities and private parties) promotes greater use of ADR and provides an analysis of the relevant structures at issue. The survey work undertaken to support this *Recommendation* showed that there were in fact few examples of alternative methods used *generally* in the administrative law sphere, though an exception was Lithuania, which *has* established a general system for extra-judicial settlement of administrative disputes. The Ombudsman principle continues to be encouraged and developed by various initiatives from the European institutions. There is also some significant evidence that ombudsman organisations are themselves starting to develop more ADR methods in their work.

A key message that emerges from this Report is that a sound administrative law system is likely to be based upon the establishment of a number of diverse institutions and procedures, combined with convenient points of departure. Furthermore, these institutions and procedures all need to be developed sensitively to their national legal cultures and policy sectors in order that an appropriate balance between formal court, tribunal, ombudsman and ADR methodologies can be struck. The future relationships between these pillars of administrative law protection need to be carefully considered and calibrated in order to better deliver the proposed reforms in the government's White Paper (2004).

# 1. Introduction

## The context of the Report

This Report has been prepared at the time of the appearance of the government's White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243), July 2004, which has taken forward the reform proposals of the Leggatt Review of Tribunals (2001) and has addressed aspects of the wider debate around dispute resolution between citizen and state and at the workplace. The White Paper has confirmed 'a commitment across government to better handling of complaints and faster, friendlier and cheaper solutions.' The unified Tribunal Service envisaged in the White Paper will have a role to promote 'proportionate dispute resolution'. The new Service will have a clear mission 'to resolve disputes in the best way possible and to stimulate improved decision-making so that disputes do not happen as a result of poor decision making'. It is intended that the whole 'end to end' process of administrative justice be improved. The task of the unified service will be to assist in both the prevention and resolution of disputes 'using any appropriate method' (White Paper, 2004:para. 1.14).

In that context, it is therefore appropriate that this Report explores aspects of the framework and the methodologies pursued in other European states to see if there are any useful lessons to be learned from their arrangements to deliver suitable remedies to achieve administrative justice. This Report examines in outline the systems in three countries: the Netherlands, Norway and Germany. In each, there are some distinctive characteristics and developments in this field. The Netherlands has had a reputation for informal complaint resolution ingrained into its legal culture. Historically, its administrative courts were separate from ordinary courts, but (unlike the courts in Germany and France) they were not an integrated hierarchy which paralleled the ordinary courts. More recently, through the General Administrative Law Act of 1994, the Netherlands stands as an example of a country that has adopted a comprehensive codification of its administrative law. In Norway there is no discrete system of administrative law – the ordinary court hierarchy adjudicates in practically all matters. There are also fewer examples of specialised courts or tribunals. Norwegian legal culture lacks any strong tendency of recourse to the courts, except in the area of taxation. Germany, on the other hand has a highly structured system of separate administrative law courts, which are equal in status to the ordinary courts - a classic feature of civil law systems. Finally, at the level of the European-wide institutions a view is developing, but by no means universally accepted,

that a common administrative law in Europe is gradually taking shape. A number of 'soft law' initiatives from both the EU and the Council of Europe are appearing.

In this Report, each of the three countries examined are organised into three sections: an overview of the administrative law system and court structure; an outline of the ombudsmen schemes; and developments in Alternative Dispute Resolution (ADR). A brief examination of some of the key developments in the European institutions follows the discussion of the country reports. Finally, there are some concluding observations on the themes and insights which have emerged from this study.

### **Administrative law remedies**

Administrative law remedies, by definition, relate principally to the methods by which the citizen can obtain access to justice to resolve his/her dispute with a public authority. The ways in which the European nations organise themselves in this regard depends to a large extent on fundamental constitutional, political and cultural factors which vary across the European jurisdictions. The most familiar technique has been judicial review of administrative action within the framework of a formal civil court system. There has also been, to a greater or lesser extent, the development of specialist courts or tribunals. This has occurred in response to the increasing demand for civil justice consequent upon the tendency of most European states to increase their public intervention in ever increasing areas of civil, political, economic, social and cultural activity. Public regulation has also expanded in relation to the private sector, increasingly utilised for public tasks.

The expansion of the administrative apparatus of European states has additionally fuelled a movement from the 1950's and 1960's to provide legislatures with more effective tools to bring administrative authorities to account. The office of the (Parliamentary) Ombudsman has developed, first in the Scandinavian countries, and then more broadly in both a geographical and sectoral sense. The notion of an independent ombudsman, with powers to investigate and report back to the legislature the failings of government departments on complaint by the citizen, has taken a firm root in European legal culture. The ombudsman principle has also spread significantly to the private sector in many jurisdictions. Indeed, as will be seen, in some jurisdictions it has first appeared and taken a firm root in the private rather than public sector. In both public and private ombudsman schemes a key characteristic has been the adoption of flexible procedures to resolve disputes. Frequently, the Ombudsman's decision, as in the UK, only has the status of a persuasive recommendation, yet the high status of the ombudsmen often secures

credibility and legitimacy which has enhanced the likelihood of a positive administrative response.

There are also a number of 'alternative dispute resolution' (ADR) methods, usually referred to as 'mediation' and/or 'conciliation', which over the last twenty years or so have become increasingly popular in many European states. However, it is important at the outset to gain a clear concept of what 'ADR' means, as this term has been over-used and sometimes misused. Some definitions of ADR, for example, include 'arbitration', i.e. the contractual agreement to go to an arbitrator in the event of a dispute and be bound by that person's decision. However, more frequently, arbitration does not appear within the definition of ADR. Although there has to be an initial agreement for arbitration to take place, once that agreement is concluded the third party (arbitrator) is in effect vested with the power to decide in the same manner as a court judge. ADR, for the purposes of this paper, has the following characteristics:

- Voluntarism – the parties should come to the mediation of their own free will
- Confidentiality – what occurs in a mediation remains confidential to the parties and the mediator
- Interest-based resolution – the mediator will (skilfully) assist the parties to recognise their own and their common interests in arriving at a settlement of the dispute
- Facilitation – the third party mediator facilitates but does not impose the resolution to the dispute
- Relationship-saving quality – mediation tends to preserve the basis for a continued relationship between the disputants.

There are no mandatory instruments of international law in relation to ADR whereas there are many examples of national legislation on arbitration and indeed, at the international level, the UN Commission for International Trade Law (UNCITRAL) has proposed a Model Law for arbitral legislation.<sup>1</sup> However, a number of intergovernmental organisations have placed ADR on their agendas, proposing and adopting non-mandatory legal instruments ('soft law').<sup>2</sup>

---

<sup>1</sup> UNCITRAL Model Law on International Commercial Arbitration:  
<http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>

<sup>2</sup> For example, the Council of Europe recommendation on family mediation of 1998. Recommendation R (98) 1  
- <http://cm.coe.int/ta/rec/1998/98r1.htm>. See section D in this Report, below.

Judicial review by the courts, specialised justice, ombudsmen schemes, arbitration and ADR procedures have all been utilised to some extent within the jurisdictions considered in this Report. There are some common themes to observe. Yet, as will be seen in this Report, the particular mixture of methods and emphases given by the prevailing legal, social and political cultures of these countries, has produced a diverse remedial landscape.

## 2. Netherlands

The Dutch Constitution, adopted in 1983, urged the legislator to promulgate general rules of administrative law. The General Administrative Law Act 1994 (GALA 1994) followed the recommendations of a Commission appointed to draft such rules.<sup>3</sup> The courts and tribunals of the Netherlands had been a 'patchwork of general and specialised courts operating independently of each other.' The Netherlands had had administrative courts which were separate and distinct from ordinary courts. However, unlike the administrative courts in France and Germany, for example, these courts,

'..were not an integrated hierarchy which paralleled the ordinary courts. Instead, there were half a dozen or more administrative courts or court-hierarchies, each sovereign in its own sphere, while the ordinary courts also exercised jurisdiction in some administrative law cases. As a result, our case law was no more coherent and unified than was our legislation.' (Ministry of Justice, 1994:1).

The Dutch government decided in 1989 to reorganise the court system and one of the aims of this reform was to integrate the administrative courts with the ordinary courts. Administrative cases are now generally dealt with by administrative sections of the ordinary courts. A uniform Code of Procedure, to be used both by the new administrative sections of the courts and remaining separate administrative courts became in due course Chapter 8 of the General Administrative Law Act. The move to integrate administrative law into the district court system, according to one commentator, 'brings to an end the very hesitant introduction of judicial review into the Dutch system'. Although social security review dates back to 1955 when special courts were established it was not until 1974 that judicial review of other branches of public administration was introduced (Blankenburg, 1999). Prior to this date:

'Dutch public agencies considered themselves "open" to public complaints, and granted direct access to citizens to hear their concerns on an informal basis.'  
(Blankenburg, 1999:444).

---

<sup>3</sup> Article 107(2) 'The general rules of administrative law shall be laid down by Act of Parliament.'

The initial system, broadly, was to allow an internal administrative review by the authority and appeals to a section of the Council of State<sup>4</sup> acting as a court of both first and last instance for administrative matters. Although the reforms of GALA 1994 have brought the Netherlands more into line with general European trends, it is thought that the reforms were driven by the rising caseload in administrative matters which the Council of State could no longer deal with satisfactorily (Ibid, 444).

## **i. Overview of court system / administrative justice**

### ***The General Administrative Law Act 1994 (hereafter 'GALA 1994').***

GALA 1994 and its subsequent development, has made a distinctive contribution to the legislative methodology of European administrative law systems. Its main goals were to unify and codify legislation within the field of administrative law and its introduction marked 'the end of an era in which the development of general administrative law was mainly left to the courts' (Brouwer and Schilder (1998:8). GALA 1994 has a pyramid-like structure so that Chapter One, for example, contains key concepts such as a 'decision' and an 'application' which apply to subsequent Chapters.<sup>5</sup> The rules contained within GALA 1994 govern the preparation, reasoning and publication of administrative decisions and the conditions under which a citizen may file an objection or appeal against such decisions. GALA 1994 applies to all categories of official decision-making and obliges government bodies to state in their decisions how the citizen may object or appeal. The common rules for administrative law redress set out in GALA 1994 are examined in further detail below. However, in some fields of law different procedures, governed by specialised legislation, may apply. A close examination of the decision in question will reveal the legislation it is based upon, and in cases of doubt whether the GALA 1994 procedure applies or not, that specialised legislation should be consulted. If that legislation is silent on objections and appeals, the normal procedures of GALA 1994 will apply. In short, GALA 1994 has provided a default procedure of redress across the whole field of Dutch administrative law.

In general, it is not possible for the citizen to appeal directly to a court. There is generally a requirement to file an objection with the body that took the decision. There are some exceptions to this, for example, where the decision was preceded by a lengthy

---

<sup>4</sup> The purely advisory function of the Council of State was held by the ECHR as insufficient to meet the criteria for recognition as a judicial court: see *Bentham v Staat der Nederlanden* EHRM 23 Oct 1985.

<sup>5</sup> This is subject to exceptions: see sections 7:14 and 7:27 of GALA 1994 which contain definitions which are made exceptions to the pyramid effect of the Act.

consultation period. An interested party must file the notice of objection within 6 weeks of the decision.<sup>6</sup> The administrative body will then generally arrange a hearing and take evidence from the parties. A legal representative can assist but this is not compulsory and the costs of witnesses and experts are borne by those calling them. The authority must make a report of its review and the reasons on which it is based within 10 to 14 weeks of receipt of the notice of objection.

During the course of the objection procedure the decision complained of will generally remain in force. However, in exceptional cases the interested party can apply to the administrative court for a provisional remedy, usually a temporary suspension of the decision, for example where the decision would cause irreparable damage or would have irreversible consequences. If the person still does not agree with the conclusion of the administrative body that person may apply for a review by a court within 6 weeks. This will generally be the administrative law sector of one of the 19 district courts in the area where the person lives. The general rule is that the objection procedure must have been concluded before an application for court review can be lodged. A registry fee is charged for a court review. The costs of legal representation (not compulsory) and fees for witnesses/experts will also be payable.

On receipt of an application for review, the court will initiate a preliminary enquiry and request all relevant documentation from the administrative authority and may choose to interview the applicant. On the basis of the paper review (and possibly the interview) the court will then decide whether to hold a hearing. Under a simplified procedure the court can take a decision solely based on the papers without a hearing. However, the parties are then entitled to enter an objection to such a decision with the same court. The court will then reconsider its own decision not to hold a hearing.

If a hearing is chosen, the parties are summoned to attend and will be given information about how to inspect the file containing the case documentation. The original decision will remain in force during the court's review, subject to the applicant requesting a provisional remedy. A legal representative is not compulsory 'but it is advisable to do so' (Ministry of Justice, 2002:35). The parties may call witnesses and/or experts. The court's judgment may be a new decision or it may instruct the administrative authority to make

---

<sup>6</sup> '1. Interested party means the person whose interest is directly affected by an order.' (Section 1:2, GALA 1994).



the decision in the light of its judgment. Costs may be awarded against the party who was found to be in the wrong. However, 'in practice, a natural person is ordered to pay costs only if his appeal was manifestly unreasonable.' (Ministry of Justice, 2002:35).

In general, an appeal will lie against the district court's review to the Administrative Jurisdiction Division of the Council of State. The court's judgment will explain how and to whom an appeal lies. However, in some cases a specialised court will hear the appeal. The Figure on page 9 illustrates the organisation of applications for review and appeals in administrative law cases in the Netherlands.

**Figure 1: The organisation of applications for review and appeals in administrative law cases in the Netherlands.**

Applications for review and appeals in administrative cases	
<b>Most common cases</b>	
application for review	administrative law sector of one of the 19 district courts
appeal	Administrative Jurisdiction Division of the Council of State (The Hague)
<b>Environmental, planning and other cases</b>	
first and sole instance	Administrative Jurisdiction Division of the Council of State (The Hague)
<b>Civil/public service cases</b>	
application for review	administrative law sector of one of the 19 district courts
appeal	Central Appeals Tribunal (Utrecht)
<b>Social security cases</b>	
application for review	administrative law sector of one of the 19 district courts
appeal	Central Appeals Tribunal (Utrecht)
<b>Immigration cases</b>	
application for review	Aliens Division, The Hague District Court
appeal	Administrative Jurisdiction Division of the Council of State (The Hague)
<b>Various economic and agricultural cases</b>	
first and sole instance	Trade and Industry Appeals Tribunal (The Hague)
<b>Tax cases</b>	
appeal	Court of Appeal
cassation	Supreme Court (The Hague)
<b>Fines imposed under administrative law</b>	
application for review	sub district sector of one of the 19 district courts
appeal	Leeuwarden Court of Appeal

Source: Dutch Ministry of Justice (2002:38-9).

GALA 1994, and its subsequent development, has provided a greater clarity for administrators in respect of preparing and delivering decisions and orders. It has also enabled the citizen to know more clearly what the procedures are to redress their grievances against administrative authorities. The general pattern – the notice of objection procedure, application for court review and appeal – is now clearly established and integrated within the Dutch legal system. In the UK the Council on Tribunals has for many years attempted to devise model rules of procedure for the scheduled tribunals under its supervision with varying degrees of success. In the Netherlands, GALA 1994

represents the same concept but instead of relying upon persuasion this has been achieved by primary legislation.

### ***Preliminary injunction procedure (kort geding)***

Comparisons with other jurisdictions are notoriously treacherous, given the different historical, social and other conditions which may exist between countries. However, Dutch legal culture has been described as pragmatic and principally aimed to filter out disputes before they reach the more formal adjudication processes (Blankenburg 1999), a characterisation not unlike some features of the English legal system. Recent empirical evidence appears to confirm that, although 'justiciable' problems arise frequently in the lives of Dutch citizens, a significant majority of people tend to resolve problems themselves. 'They do not frequently seek advice and relatively few problems are resolved by a tribunal or court' (van Velthoven, ter Voert and van Gammeren-Zoetewij, 2004).<sup>7</sup> Blankenburg argues that the Netherlands' relative success (like Japan) in avoiding litigation cannot be attributed to an absence of legal regulation nor an absence of conflicts, but 'avoidance is achieved by having a plurality of institutions' offering informal alternatives to judicial procedure and a number of 'exit' opportunities within court procedures (1999:449).

The development of the *kort geding* (preliminary injunction) is a good example of informality within Dutch legal culture. This is the procedure, referred to briefly above, for cases where one party's interests might be jeopardised while the case is pending. However, it has developed into a summary procedure to decide questions of substantive law.

'To decide a *kort geding* requires more than one oral hearing. The parties present their respective case and reply immediately. The proceedings are informal enough for the president of the court to indicate to the parties what their chances of success in a full action are likely to be. The non-adversarial character of the Dutch proceeding renders it highly unlikely that the lawyers would (mis-)use the free and frank exchanges of views in the *kort geding* to argue for the disqualification of the judge as biased. On the contrary, the oral hearing very often ends in a settlement achieved between the parties. On average, the cases

---

<sup>7</sup> This work is a replication in the Netherlands of the 'Paths to Justice' research carried out by Genn (1999) and Genn and Paterson (2001) in Great Britain.

in *kort geding* are terminated within six weeks from start to finish. Even though they remain free to do so, few parties initiate ordinary proceedings afterwards.' (Blankenburg, 1999:445-6).

### ***Notice of objection procedure***

The notice of objection procedure will be of particular interest in the UK as it reflects arguably a developed form of 'internal review' that has appeared in the redress systems of some sectors, e.g. social security. The administration can organise the notice of objection procedure in a variety of ways. Decisions that have to be issued in large numbers, e.g. social security, are reviewed following a notice by civil servants specifically mandated to make such decisions. Sometimes the administrative authority constitutes a committee that is composed of civil servants and outside members to gain the benefits of more independent advice, but the administrative authority is ultimately responsible for the decision. However, the legislation requires that an objector may orally explain the notice of objection to the administrative authority in question (section 7.3, GALA 1994). This hearing requirement is subject to certain exceptions (e.g. where it is manifestly inadmissible or unfounded, or the interested parties do not want to exercise their right to be heard). Although the law does not *require* the hearing to take place in public, practice hearings (in particular before committees) are in public. In general therefore, it is assumed that such decisions will be in public unless the administration takes the view that there are compelling circumstances to justify a private hearing. Section 7.5, GALA 1994 requires that the hearing be conducted by a person who was not involved in the preparation of the administrative decision in dispute. In general, interested parties are heard together in each other's presence, though other arrangements can be utilised in a suitable case. There is a legislative requirement for the authority to make a report of what happens at the hearing, as this may be important to take into account in any subsequent court proceedings.

Interested parties may bring witnesses and experts to the hearing but they will have to bear the costs themselves. The decision on the objection is made following the hearing and the objector informed of the result. The legislation requires the authority to make its decision over the objection within 6 weeks, though this is extended to 10 weeks where a committee is hearing the objection. There is also a requirement that clear reasons are given for the decision. The decision on an objection is not only a judicial review investigation into the *legality* of the original administrative decision it also involves a

consideration of *suitability*, i.e. was the original decision consistent with its purpose?

However, Brouwer and Schilder comment that:

‘In spite of this obligation to weigh interests, the judicial review usually carries the most weight. Advisory committees particularly often have the inclination to leave primarily political assessments to the administrative authority itself (that is democratically legitimized) and restrict themselves to a judicial review. Only in cases where the administrative authority acts unreasonably or in conflict with the law, does the advisory committee suggest a revision.’ (1998:71).

The advantages of the notice of objection procedure are stated as follows:

- ‘First, it has advantages for the *administration*: it provides the opportunity to correct mistakes and to reconsider whether the decision that has been taken was right.
- Second, the *courts* benefit from the proceedings, because a substantial number of cases are not brought to court (because the plaintiff either succeeded in his objections, or he has learned that his case is not strong enough to take it to court). Furthermore, the cases that do reach the court are better prepared.
- Third, the *plaintiff* has the advantage that the decision can be reconsidered in an informal way, and not only on arguments of law: arguments of policy also have to be taken into account. There is, however, one obvious (potential) disadvantage of this kind of preliminary proceedings. Formally one has to address the same authority that took the first decision. Is it realistic to expect this authority to review the decision with an open mind? Or is the plaintiff forced to ‘go to the wrong shop’, so that these proceedings can be chiefly considered a loss of time, energy and money? In the Netherlands, the advantages of the notice of objection are considered to outweigh the disadvantages.’ (de Waard<sup>8</sup> and de Moor, 2002:355)

---

<sup>8</sup> My thanks to Professor de Waard for kindly supplying me with a later updated electronic version of their Chapter in this work.

Some figures describing administrative cases that are disposed of by judgment are given in the Table below. The biggest category by far is social security (12,000 district court cases in 2002). However, it is noteworthy that this is about a quarter of the comparable figure in 1995. The second tier appellate level for social security cases (Central Board of Appeal) would also appear to be a busy forum with 3,800 cases in 2002, perhaps, one reason, why that explains why this specialist court remains.

**Table 1: Administrative cases disposed by judgement: Netherlands (1990-2002)**

<b>33 Administrative cases disposed by judgement</b>					
	1990	1995	2000	2001	2002
	<i>x 1,000</i>				
District court					
Civil servants cases	3.7	3.8	2.5	1.9	1.8
Social security cases	23.4	44.8	12.1	11.9	12.0
Welfare cases	.	2.6	4.1	4.2	4.0
Construction cases	.	1.9	2.8	3.0	3.1
Other and unknown cases	.	4.6	7.1	8.2	8.7
Central Board of Appeal					
Social security	3.1	1.8	.	4.6	3.8
Civil servants and pension acts	1.4	1.2	.	1.6	2.1
Courts of Appeal					
Tax cases <sup>2)</sup>	10.5	10.9	7.9	8.4	10.6
High Court					
Tax cases <sup>2)</sup>	0.7	0.7	0.8	0.7	0.7
Court of Appeal for Business and Industry	1.6	0.9	0.8	0.9	1.0
State Council					
Jurisdiction	8.7	6.1			
Disputes	5.2	5.6	3.4	3.7	3.1
Appeal concerning the general administrative law	.	0.3	1.6	1.8	2.5

1) Excl. Immigration cases.  
2) Incl. social insurance contributions.

Source: Statistical Yearbook of the Netherlands 2004, p 169, Table 33, Statistics Netherlands, Voorburg / Heerlen, April 2004

As will be explained below, mediation can be utilised both at the stage of policy preparation and during the internal review conducted by administrative authorities in response to a notice of objection. Some authorities have instituted advisory committees to deal with this activity. These committees are at least partially composed of independent persons and often have an independent chairman. The practical importance of such committees is not apparent from GALA 1994 as it is not *obligatory* to have such a committee; this has simply been a practice development (de Moor and De Waard, 2002:355). In 1999 Chapter 9 of the General Administrative Law Act laid down statutory rules on internal complaints procedures. The National Ombudsman, (currently Roel

Fernhout), set himself the target of ensuring that these rules had been fully implemented within Dutch public administration by 2005 (National Ombudsman, 2002).

## **ii. Ombudsman schemes**

The Dutch tradition in public services of remaining open to hearing complaints informally has, according to a commentator, been preserved by the institution of a system of local, as well as national Ombudsmen dealing with complaints not covered by the courts' jurisdiction (Blankenburg, 1999:444). The office of the Dutch National Ombudsman was established under the National Ombudsman Act which became law in February 1981 (amended in 1999). The office was enshrined in the Dutch Constitution in 1999.<sup>9</sup> The main task of the National Ombudsman is to investigate the actions of administrative authorities (as defined in GALA 1994) and decide whether they were improper or not. However, investigations will only take place after an individual has made known their grievances to the administrative authority in question. Chapter 9 of GALA 1994 now backs this obligation with a statutory duty on administrative authorities to deal 'properly' with complaints from individual citizens. The legislative model of the Dutch National Ombudsman is quite similar to the English Parliamentary Commissioner for Administration. Many complaints deal with policy behaviour and delays in decision-making. The competence of the National Ombudsman is limited: she/he cannot investigate the conduct of municipal civil servants and for this reason some municipalities have established their own Ombudsmen. Also, it has now become possible for municipal administrations to submit voluntarily to the jurisdiction of the National Ombudsman.

In essence, there are two principal forms of investigation. Firstly, the method prescribed in the legislation which will result in a formal report in which the National Ombudsman will determine whether the administrative action was 'proper'. The report is formally a recommendation, it does not have mandatory legal effect.<sup>10</sup> This type of investigation takes time, both sides of the argument will have to be heard and the notification of the Ombudsman's findings has to precede the issue of the report. In 2003, 504 such reports were issued.

---

<sup>9</sup> 'The National Ombudsman shall investigate, on request or of his own accord, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament' (article 78a).

<sup>10</sup> 'In spite of this, the recommendations of the National Ombudsman carry a substantial amount of weight in practice.' (Brouwer and Schilder, 1998:87).

The other method is based on early intervention by the Ombudsman and in 1994 there was a policy change to increase the use of such intervention. This method is used where prompt action is required and there are good prospects that such action can resolve matters at an early stage. After successful intervention the Ombudsman simply informs all parties that the investigation will cease. Alternatively this process can be converted into further investigation leading to a formal report.

In order to enhance the internal complaints procedures of administrative authorities it has been the policy of the National Ombudsman, since January 2002, 'to abstain from instituting an investigation until the internal complaints procedure has run its course, even if the complainant has fulfilled his obligation to make the complaint known to the administrative authority.' (National Ombudsman, 2002). In effect this gives the authority a further chance to use its internal complaints procedure. There is some evidence that an increasing number of Ombudsmen cases are in fact being resolved via mediation techniques. De Roo and Jagtenberg (2002:144) cite the Municipal Ombudsman of Rotterdam who reported in 1999 that 25% of the complaints brought were dealt with in this manner.

### **iii. Alternative Dispute Resolution (ADR)**

Administrative law remedies in the Netherlands consist of traditional forms such as arbitration and binding advice in addition to more modern forms of ADR usually referred to as 'mediation'. Mediation can be broadly described as a process where a third party acts to facilitate the parties to come to an agreement rather than, as in an arbitration, where the parties agree to be bound by a third party. The mediator will focus on the parties' common interests in order to come to a resolution of the dispute.

#### ***Arbitration***

The Netherlands Arbitration Institute (NAI) was founded in 1949 as an independent body and is the only general arbitration institute of the Netherlands.<sup>11</sup> The Dutch rules on arbitration are incorporated in the Code of Civil Procedure. The NAI's Arbitration Rules include the text of an arbitration clause which can be incorporated in all business agreements.

---

<sup>11</sup> See their website at <http://www.nai-nl.org/english/>.



‘There are in the Netherlands more than one hundred arbitral institutions, of which approximately thirty to thirty-five are presently active. Most of these institutions have their own rules of arbitration procedure, like the NAI. Many provisions of the arbitration law are not mandatory and the rules of the various arbitration institutes thus create their own procedural regime.’ (ADR Law Information Journal)

The NAI also has a structured form of mediation which has its own rules: the ‘Minitrial Rules’.<sup>12</sup> The parties can try to reach a settlement with the assistance of a mediator and thus resolve their own problems. If parties are unable to reach a settlement, the dispute will have to be settled by arbitration or by the courts.

‘The main advantages arising from the incorporation of the NAI Minitrial agreement in a contract are as follows:

- Parties agree to Minitrial proceedings before any dispute occurs
- The clause can be included in national and international agreements
- Minitrial proceedings will be conducted on a confidential basis and will not be made public
- The mediator will ideally be chosen by the parties
- The NAI can also propose an experienced and expert mediator
- Minitrial is more economical in terms of time as well as costs’ (ADR Law Information Journal)

### ***Binding Advice***

This form of dispute resolution is similar to arbitration in that it is a supra-party model of resolution. An example in the Netherlands is the consumer conciliation boards that are set up by various trades organisations and consumer councils.

### ***Mediation***

Mediation is sometimes characterised as an inter-party model of dispute resolution. The mediation offers support to the parties to come to their own agreement. A successful mediation will not be a ‘top-down’ form of decision-making. The (neutral) mediation, in principle, will merely facilitate the parties to clarify their own mutual interests in resolving

---

<sup>12</sup> These are available in English from <http://www.nai-nl.org/english/minitrage5.html>.

the dispute. The emergence of what some commentators refer to as the 'new mediation' in the Netherlands occurred in the early 1990's (De Roo and Jagtenberg, 2002). The new mediation is characterised by a greater systemisation of techniques based upon predominantly American research and an increased professionalisation. Furthermore, a strengthening of its institutional location has assisted its development. In the Netherlands, as in other European jurisdictions, earlier mediation practices had been generated from civil procedure codes requiring judicial attempts to mediate prior to a full hearing. 'Such preliminary conciliations however, were abolished almost everywhere in Europe in the 1950s and 1960s.' (de Roo and Jagtenberg, 2002:128). In the consumer law area disputes were settled through *Geschillencommissies* (Disputes Committees), considered in the Netherlands as *quasi rechtspraak* (quasi-adjudication).

'Generally, they are composed of an independent-lawyer, acting as chairperson, who will be assisted by a representative of a consumer organisation and a representative of the particular branch of industry concerned. Overall these committees practise the method of *bindend advise* (binding advice), considered attractive because of the informality of the process.' (De Roo and Jagtenberg, 2002:128-9).

The new mediation in the 1990s was initially taken up in the private sector. In 1992 the *Nederlands Mediation Instituut* (NMI) was established. This provided a spur to government which established *Platform ADR* in August 1996 tasked with an investigation of the prospects for mediation in court proceedings. Two court-annexed pilot projects were undertaken and a Policy Letter<sup>13</sup> was formulated in 2002 which became the basis for the government's intended involvement with ADR. The Letter aims to strengthen dispute resolution by the use of mediation and a consequent reduction of the courts' caseload. Following this initiative a general ADR and mediation project was initiated to advise the government on the merits or otherwise of court annexed mediation.<sup>14</sup> The programme has involved two projects: a court encouraged mediation project and a scheme to resolve disputes prior to the initiation of court procedure. A specialist journal, *Tijdschrift voor Mediation* (Journal of Mediation) appeared in 1997 and the *ADR Nieuwsbrief* (ADR Newsletter) appears eight times a year.

---

<sup>13</sup> Ministry of Justice, Meer wegen naar het recht Beleidsbrief ADR 2000-2002.

<sup>14</sup> The project was headed by the vice-president of the court of appeal in Arnhem, Machteld Pel.

The NMI has set general standards for mediation activity:

- Mediation is to be based upon the voluntary consent of all parties;
- The mediator must be independent and impartial; and
- Confidentiality is to be observed by all the parties both during and after the mediation.<sup>15</sup>

Arguably, these standards can also be derived from the UN's international standards for mediation.<sup>16</sup> Both the mediator and those in dispute will sign a mediation agreement at the outset and this agreement, contains all the NMI rules which are stated to apply to the mediation procedure. Consequently, the key principles of mediation are secured contractually. However, there is nothing to prevent a court from enquiring into the mediation process at a later date – a mediator cannot invoke any statutory professional privilege. In general though, the Dutch courts have respected the contractually based rights and duties of the mediation process: see de Roo and Jagtenberg (2002:134, fn 25). If there is a settlement of the dispute from the mediation process this will be placed in a settlement contract. Such contracts fall outside the duty of confidentiality and can be litigated in court against a defaulting party.

The fundamental right of access to the court, enshrined in the Dutch Constitution (article 17) and in the ECHR (article 6) is relevant both to the initiation and conclusion of the mediation process. In short, the essence of the case law is that where there is a *voluntary* reference to ADR this will be permissible under article 6 of the ECHR, irrespective of whether there is a full court review. Where there is a *mandatory* reference this will be permissible in the context of a full court review, but if there is no such review then it will not meet the requirements of article 6.<sup>17</sup>

According to NMI data in 2001<sup>18</sup> there were three important areas of mediation caseload: family disputes (44%); labour disputes (25%); and commercial disputes (13%). Administrative law disputes accounted for 2% (31 cases registered since 1999) of all cases. Mediation can be used in Dutch administrative disputes in two types of case.

---

<sup>15</sup> NMI Mediation rules, 1995, as amended in 2001. The rules can be found at: <http://www.nmi-mediation.nl>.

<sup>16</sup> See the UNCITRAL Model Rules on Conciliation 1980. See <http://www.uncitral.org/english/texts/arbitration/conc-rules.htm>

<sup>17</sup> See De Weer, Decision of 27 February 1980, Series A, No 35; Obermeier, Decision of 28 June 1990, Series A, No. 179.

<sup>18</sup> NMI Informatie (2001) *Tijdschrift voor Mediation* Vol 3.

Firstly, during the policy preparation stage (*beleidsvoorbereiding*) of a public law juridical act (*besluit*), e.g. a development plan or policy rules; secondly, during the internal review procedure of the administrative authority (*bezwaarfase*). An issue, which has arisen in the Netherlands, is the extent to which mediation – a method used to achieve individual justice – can be appropriately adapted to use in administrative law disputes that axiomatically tend to involve multiple interests and a range of interested parties.

An administrative court can refer the parties to mediation. ‘Once a case is pending in an administrative court, Dutch law allows for the judge to probe opportunities for an amicable settlement’ (de Roo and Jagtenberg, 2002:142). De Roo and Jagtenberg comment about the lack of any single organisation offering mediation services in the administrative law area, though there are a few private organisations established, e.g. the Foundation for Mediation in Environmental and Planning disputes (*Stichting Mediation in Milieu en Ruimtelijke Ordening*). This latter organisation appears to have built up an expertise in mediation during the preparation of plans/policies (*beleidsvoorbereiding*). The mediator brings the public authorities and interested private parties together to discuss the proposed new public law instrument. If there is agreement at an early stage it is possible for the authorities and interested parties to put their agreement into a ‘public-private covenant’ (*convenant*). A covenant is characterised by one commentator as

‘a gentlemen’s agreement between the public administration and private partners. The contents of such a covenant can be, for instance, that a certain sector of industry will reach a certain goal within a certain period of time. For example: see to it that waste production of a certain kind will be brought down to a certain level. If the branch of industry agrees to that, the government agrees to refrain from taking public law measures to reach the agreed goal.’ (de Waard and de Moor, 2002:361).

It is generally assumed that the legal status of such agreements is that it cannot be a public law instrument; it must (therefore) be a private law instrument.

Mediations taking place during internal reviews (notice of objection procedure) are increasingly entrusted to standing committees of those authorities (*adviescommissies voor de Bezwaarschriften*). This professionalisation of mediation allows for the development of good procedural standards within the authority and a successful mediation reached before the committee will become the basis of a new official decision. Court appointed mediation can involve a (different) judge as the mediator. This clear

separation of the roles of the judge hearing a case and the judge as mediator was adopted in the court appointed pilot project with administrative law disputes in the Zwolle district court.<sup>19</sup>

De Roo and Jagtenberg summarise the achievements of mediation in administrative law disputes into three categories.

- Firstly, the policy preparation mediation they claim 'is just beginning to show positive results, particularly in the area of environmental policy'.
- Secondly, however, information on mediation during the course of internal review is 'merely anecdotal'.

'It seems mediation is used successfully in those cases where the number of interested parties is limited, and the parties are identifiable. This applies particularly to employment disputes between government employers and their civil servants; and - to a lesser extent - to disputes over building permits, that merely have an impact on the direct neighbour(s) of the applicant.' (de Roo and Jagtenberg, 2002:144)

- Thirdly, there has been an increasing amount of data relating to in-court mediation experiments, e.g. in the city of Zwolle district.

'In the year 2000, judges in the Zwolle district court referred 65 cases to the specialised judge-mediator (who herself was not involved in hearing or deciding these cases). Out of these 65 cases, 34 were completed in the year 2000, and out of these 34 cases, 21 were concluded with a settlement agreement. It is noteworthy that a considerable number of settlements related to labour disputes involving civil servants; such disputes are handled by the administrative courts. Out of 34 cases, 13 cases related to civil servant disputes; 11 of these cases were settled through mediation.' (Ibid).

---

<sup>19</sup> Pach M A, 'Mediation in het bestuursrecht; het kan, het mag en het werkt Alternatieven van en voor de Bestuursrechter', VAR Preadvies 126 Boom Juridische Uitgevers, Den Haag, 2001.

The government's role in mediation however, would appear to remain equivocal. It is interested in the ability of mediation to reduce judicial caseloads and has, via the *ADR Platform*, indicated areas where mediation might be useful and initiated some pilot projects to test this policy. But the government continues to rely on private mediation services to actually deliver this activity. However, de Roo and Jagtenberg add a note of caution about some policymakers liking for *mandatory* referrals to mediation. They hold that this is a misguided strategy.

'We contend that mediation can only be truly facilitative, if it is structured against the backdrop of an accessible legal system. It should not be mediation *or* law. It should be mediation *and* law.' (de Roo and Jagtenberg, 2002:145)

### 3. Norway

#### i. Overview of court system/administrative justice

The administration of justice in civil matters was first given its modern form in civil procedure legislation in 1915. The Civil Procedure Acts of 1915 have been subject to continuous amendment, inter alia by a new Enforcement Act of 1992, but by and large civil procedure is still governed by the same principles. A public report from an expert group appointed by the Norwegian government was produced in 2001. This proposed some radical changes to the Civil Procedure Acts. The report includes a draft version of an Act relating to the Resolution of Disputes (hereafter the 'Dispute Act'), and an account of the appointment, terms of reference and work of the Committee, and a summary.<sup>20</sup> There has been no implementation of these reform proposals at the time of writing, but it is possible that some of these changes in civil procedure law will arrive in 2005.<sup>21</sup>

The civil court structure in Norway comprises four tiers.<sup>22</sup> Firstly, there are the conciliation court/board (*forliksråd*), which is both a mediating body and a court. Current civil procedure prescribes that in general, subject to some exceptions, *all* civil suits must be commenced at this level.<sup>23</sup> Each municipality has its conciliation court, which is made up of three laymen and is frequently chaired by a retired mayor. The township council elects the board for a four-year period. The conciliation courts have a long history in Norway and are an intriguing example of the combination of the judicial power and mediation methods. When the parties meet, an amicable settlement is attempted and, if successful, the agreement can be enforced like a judgment. But the court also has a judicial power to pass judgment, a power which was significantly extended in reforms introduced in 1993. The conciliation courts are frequently used. It is estimated that there were a total of 226,575 cases of civil disputes that were dealt with by the Conciliation boards in Norway in 2002 (Statistics Norway<sup>24</sup>). The long-term trend in caseload over the past 20 years can be seen in Table 2 below.

---

<sup>20</sup> See Ministry of Justice website for the report: <http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012001-020015/inn-bn.html>

<sup>21</sup> Personal communication from Professor Arnfinn Bårdsen, 29 June 2004.

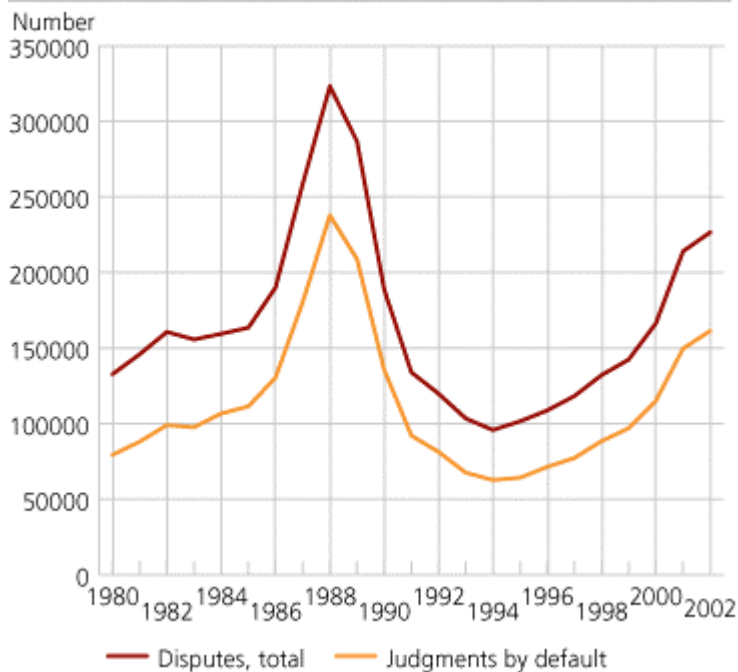
<sup>22</sup> This account of the court system is reliant on Winsvol (2000).

<sup>23</sup> Article 272 Lov om rettergangsmaten for tvistemal (Civil Procedure Act) 1915. Each municipality in Norway must have established a conciliation board – article 27 Lov om domstolene (Courts of Justice Act) 1980.

<sup>24</sup> See [http://www.ssb.no/english/subjects/03/05/forlik\\_en/main.html](http://www.ssb.no/english/subjects/03/05/forlik_en/main.html)

**Table 2      Disputes dealt with by conciliation boards (1980-2002): Norway**

**Disputes dealt with by the conciliation boards. 1980-2002**



Source: Statistics Norway:

[http://www.ssb.no/english/subjects/03/05/forlik\\_en/main.html](http://www.ssb.no/english/subjects/03/05/forlik_en/main.html)

However, the great majority of cases are in fact not conciliated/mediated at all. It is estimated that of the total cases 96% were dealt with by a default judgment (usually for debt cases). There were in fact only around 3 of the total, or almost 7,300 cases which were settled through mediation. Another 4,000 cases had to be referred to the district courts.<sup>25</sup>

It should also be remembered that there are some significant exceptions to the underlying legal duty to take a civil claim to the conciliation courts: e.g. where both parties have received legal assistance and agree that mediation in front of a conciliation board is pointless. There are further exceptions to the duty:

'The conciliation boards cannot hear disputes governed by the Marriage Act or the Act relating to Parents and Children, or in disputes between spouses or divorcees regarding the division of marital property. Nor can the conciliation boards handle

---

<sup>25</sup> Ibid.



disputes under the copyright and intellectual property laws, disputes regarding ancestry, *disputes regarding decisions made by the state, regional or local governments or administrative agencies placed under these governments.*

Disputes regarding the validity of decision made by arbitration cannot be handled. Finally, disputes that already have been solved by the public arbitration boards for consumer disputes and rental disputes are not eligible for trial by the conciliation boards.' (Olsen, 2004:4-5, my emphasis)

The conciliation board is further restricted in that more complex disputes deemed unsuitable for final treatment in that forum will be referred to the district courts. However, where mediation does take place the conciliation board will listen (in private) to both sides of the argument and then attempt to mediate and identify a basis for settlement. This will be done on the basis of any applicable statutory law and upon what the board thinks is a 'reasonable' solution. In this respect, the foundation for its jurisdiction is quite distinct from the other courts which can only apply statutory law. (Olsen, 2004:8).

Secondly, there are the district courts, (*herreds - og byrett*) which hear both civil and criminal cases. They are the first instance in criminal cases and in civil cases which do not need to be dealt with in the conciliation court. Norway is divided into around 100 jurisdictions, of which Oslo is the largest. Most of the district courts, however, are small, with only one or two full-time professional judges and one or more assistant judges.

Thirdly, there are the High Courts or Courts of Appeal (*lagmannsrett*). Their function is to hear interlocutory and other appeals against the judgments of the district courts in both civil and criminal cases. Norway is divided into six such appellate jurisdictions, mostly named after the ancient regional moots – *Borgarting, Eidsivating, Agder, Gulating, Frostating and Hålogaland*. They are staffed by between 10 and 40 appellate judges and presiding judges. Each court is led by a chief court of appeals judge (*førstelagmann*). Finally, there is the Supreme Court (*Høyesterett*), which sits in Oslo and consists of 18 judges under the presidency of the Chief Justice (*Høyesterettsjustitarius*). The Appeals Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*) is an independent part of the Supreme Court; among other things it decides whether cases shall be heard before the Supreme Court and itself decides interlocutory appeals related to procedural issues and certain other decisions of lower courts.

A characteristic feature of the Norwegian court system is that the courts generally consider all types of case. There is no discrete system of administrative law found in some other European jurisdictions.

‘The Norwegian Supreme Court and the lower courts, all the way down to the smallest district magistrate offices, adjudicate both criminal and civil cases, everything from child custody to multi-million-kroner suits. There are, therefore, few examples of tribunals in Norway. Among those that do exist are the land courts (*jordskifterett*), which among other things decides redistribution of agricultural land and boundary disputes. Another tribunal is the Labour Court (*arbeidsrett*), which judges in questions of wage agreements and employer-employee issues. The Social Security Appeal Tribunal (*trygderett*) is not strictly speaking a court, but an administrative tribunal that decides appeals under the National Insurance Act. The same goes for the county social welfare boards (*fylkesnemnd for sosiale saker*), which among other things decide child custody disputes. These boards are chaired by a jurist, who decides cases in consultation with professionals and laypeople. Decisions made by these bodies can be appealed to the ordinary courts.’ (Winsvol, 2000).

It has been said that Norway ‘does not have ... a strong tendency of recourse to the courts about administrative decisions, except in the area of taxation. The role of lawyers remains limited compared with other countries, and the courts themselves show little inclination to address regulatory [and other administrative] issues.’ (OECD, 2003:para 2.5.2.3). One reason for this is that Norway does have a fairly comprehensive system of administrative review by public bodies. Rather than disputes landing up in the civil courts, there is a tendency for them to be handled by a number of quite accessible *intra*-administrative remedies. Any decision in an individual case, taken by a public authority, is subject to appeal to a superior (administrative) authority, unless expressly stated otherwise.<sup>26</sup>

‘The right to appeal extends to whoever has a ‘legal interest of appeal’, which is interpreted liberally. The authority of the appeal body is usually as wide as that of the authority in the first instance.’ (Bugge, 2002).

---

<sup>26</sup> Article 28, Public Administration Act 1967.

The legislation specifies that where a central government agency is the subject of an appeal then it will be directed to that agency. Where it is a decision made under municipal authority an appeal will lie to the municipal council or a special appeal body appointed by the municipal council.

Norway has made some initiatives in the criminal justice field, like other European countries, to achieve measures of 'restorative justice' by means of mediation. A system of mediation in conflict resolution boards was enacted in 1991. The prosecution service can send minor offences to a 'conflict resolution board' for mediation as an alternative to regular criminal proceedings. The parties themselves or a school or child protection service can also initiate this route. The main target group for conflict board mediation is young offenders, including children under the age of criminal responsibility (16) although there is no upper age limit. The offender and victim meet with a mediator in order to reach a mutually acceptable agreement.

It would appear this model is being developed also on the civil side.

'Conflict boards are increasingly used in civil cases too, that is, cases not brought by the police – this applies both to cases that would otherwise have been criminal, and purely civil disputes. The conflict board system is under constant development, and in 1995 a pilot scheme was initiated for training of teachers and pupils to mediate in school conflicts.' (Winsvol, 2000).

There have been a number of pilot projects in court-encouraged and out-of-court mediation. Indeed, the former includes not only the possibility of the court appointing a mediator (often a lawyer) but also the appointment of a judge as mediator.<sup>27</sup> As regards out of court mediation, a good example is the development of the Consumer Disputes Board (*Forbrukertvistutvalget*). If a case cannot be resolved by the county consumer office the complainant can bring the complaint to this board.

'Moreover, in recent years the consumer protection authorities have co-operated with various industries to establish several so-called industry tribunals (*bransjenemnder*). These consider for example complaints about insurance or banking services, electricity supply, domestic electrical apparatus, photographic

---

<sup>27</sup> A pilot project of 'judicial mediation' was carried out in Oslo City Court in 1999.

work, estate agencies (realtors) and so forth. A number of cases are brought before these tribunals; their decisions are not normally legally binding but are often adhered to in practice regardless. An innovation of 1995 was the passage of a law whereby the decisions of the Complaints Tribunal for Charter Travel (package holidays) should have the force of law unless brought before the courts.' (Winsvol, 2000).

## **ii. Ombudsman schemes**

As explained above, the existence of a general right of appeal from an administrative decision to a higher authority has limited the numbers of cases landing up in the courts. In addition, Norway has an accessible Ombudsman system. Anyone who feels they have been unfairly treated by a public authority or otherwise has suffered injustice by such a body may file a complaint: 'the procedure is fairly straightforward, with few formal rules' (Brugge, 2002). The Parliamentary Ombudsman was introduced in 1962, but it should be noted that there were already two schemes in Norway: for national defence (1952), and conscientious objection (1956); and there have also developed ombudsmen schemes relating to the protection of consumers (1972), the promotion of gender equality (1978) and the protection of children (1981).<sup>28</sup> There are also regional ombudsmen, for patients for example.

In some respects the development of the Parliamentary Ombudsman in Norway has prevented the need for a fully-fledged development of a specialist tribunal sector.

'The Ombudsman scheme was a supplement to the administrative complaints scheme. Administrative tribunals were not however introduced. The Parliamentary Ombudsman has in many ways filled the space represented by the absence of administrative tribunals. Through his investigations and statements the Ombudsman can contribute towards uniformity of the law, development of the law and clarification of the law, thereby helping citizens to avoid unnecessary litigation before the courts.' (Parliamentary Ombudsman, 2002).

However, in some areas, special bodies of appeal have been set up. The tax authorities have tax assessment boards and tax appeal boards. Social security decisions can be

---

<sup>28</sup> See <http://odin.dep.no/odin/engelsk/norway/system/032005-990405/> for a summary of the role of the six ombudsmen in Norway.

reviewed by a superior social security administration agency before eventually being brought before a special body, the social insurance review board.

Norway introduced one of the earliest Parliamentary Ombudsman institutions. The Parliamentary Ombudsman Act 1962 was influenced by earlier models from Sweden and Denmark. The individual's citizen's rights were further strengthened in the Administrative Procedure Act 1967 which established a number of freedom of information measures. A general duty placed on the administration to give reasons for decisions was established and a general right of citizens to have administrative decisions appealed to a higher administrative body were laid down in this Act.

'The Storting [Norwegian Parliament] decided to establish the office of Ombudsman partly to "enhance and safeguard the individual's legal position in relation to the public administration", and partly to create "a control body which, in a practical and flexible manner, can handle the complaints concerning decisions of the administration and investigate them." (Holmboe, 2001).

The Parliamentary Ombudsman is elected by Parliament for a period of four years. The Parliamentary Ombudsman will not be able to examine cases where there is an existing right of appeal either to the courts or to the administrative authority itself. There is an important exception to the latter exclusion however.

'In cases where the King in Council (the Government) is the appellate body, the rule that decisions must be appealed to a higher administrative authority before a complaint can be submitted to the Ombudsman does not apply. This means that decisions initially passed by a Ministry may be appealed to the Ombudsman without an appeal first being made to the King in Council.' (Parliamentary Ombudsman, 2003)

The Ombudsman can initiate investigations himself or in response to complaints. The Norwegian Parliamentary Ombudsman does have the power to make a formal recommendation to bring a case to court and this gives the citizen the legal right to have legal expenses covered by the state. 'Such recommendations are seldom given, but one should not disregard the value of this option.' (Holmboe, 2001). In keeping with the practice of other European Ombudsmen, there is no power to impose a 'binding' decision upon the parties.

It is interesting to note that the current Parliamentary Ombudsman (Arne Fliflet since 1990) has repeatedly pointed out the increasing complexity of the legal issues coming up in the complaints received and states his opinion that the public administration's relationship with citizens is being increasingly 'juridicalised', not only in terms of the acquisition of citizens' 'rights' but also in terms of the citizens' relationship with case processing (Parliamentary Ombudsman, 2002:10).

The Parliamentary Ombudsman only initiates about 15-20 cases each year; the rest will be by way of complaint. There is evidence however, that the Ombudsman settles a good proportion of cases upon preliminary inquiry. Many of these involve complaints about slow case processing on the part of the administrative authority. In 2002 the Parliamentary Ombudsman received 2,146 complaints concerning administrative agencies.

'The Ombudsman concluded 2,217 cases during the year. 1,170 cases were considered on the basis of the facts in issue and 23.2 % of these cases were settled while being handled by the Ombudsman.' (Parliamentary Ombudsman, 2002:24).

The Norwegian Parliamentary Ombudsman, in part because of history and the particular relationship that this office has with the *Storting* (Norwegian Parliament), serves as a significant and developing source of administrative remedy for citizens over a wide range of administrative activity. Furthermore, the Ombudsman appears to take a much more proactive role in supporting the practical implementation of human rights by the administration than its comparator in the UK.<sup>29</sup>

---

<sup>29</sup> See, for example, Parliamentary Ombudsman (2002:14-5); and (2001:19-2).

### **iii. Alternative Dispute Resolution – the proposed ‘Dispute Act’**

In recent years the debate about ADR has been dominated by the proposals of the Civil Procedure Committee of Norway to have a new civil procedure code (the ‘Dispute Act’) to replace the Civil Procedure Acts referred to above.<sup>30</sup> The proposed Dispute Act includes a number of ADR features. The view of the Committee was that ADR was clearly shifting to become a primary or at least co-equal partner to traditional court procedures. The benefits of ADR were not so much debated as assumed, ‘the question being rather how to make these systems work for the best’ (Bårdsen, 2002). The Committee stressed that ADR should not be constrained to consumer complaints and small claims. In addition to acknowledging the potential savings in court time and other merits the Committee also noted that confidentiality could be maintained more strongly than in ordinary court proceedings. This might well be appealing to users and such greater privacy might be capable of reducing the conflict and anxiety levels which litigants frequently experience. Finally, ADR was capable of providing a more customized solution of disputes than court proceedings could. The Committee were also aware of the drawbacks: the citizen ought in principle to be able to seek a judicial decision – no-one should be compelled to negotiate; in some disputes it was in society’s interests to have an authoritative legal solution which ADR might not be able to produce; uneven resources could skew the negotiation climate unless protected by law during the mediation; and if mediation fails then valuable resources are lost.

#### ***Out-of-court procedures***

The Civil Procedure Committee proposed a Pre-action Protocol,<sup>31</sup> i.e. a guide to parties about their conduct prior to going to the courts. The aim is to encourage early and full appropriate information about a claim and to enable the parties to avoid litigation by agreement, a settlement of the claim. Such conduct however will not be wasted even if litigation results, as the early disclosure of information ought to have clarified issues and will support the efficient management of the court proceeding.

The Dispute Act lays down a general duty to seek a prior amicable settlement ‘if necessary through conciliation before the Conciliation Board, by non-judicial mediation or

---

<sup>30</sup> See Ministry of Justice website for the report: <http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012001-020015/inn-bn.html>

<sup>31</sup> See the eight Pre-Action Protocols which accompany the Civil Procedure Rules in England & Wales: [http://www.dca.gov.uk/civil/procrules\\_fin/menus/protocol.htm](http://www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm)

by bringing the dispute before a non-judicial dispute resolution board'<sup>32</sup>. The latter is a reference to specialized agencies connected to consumer disputes (Bårdsen, 2002).

### ***Conciliation Boards***

Conciliation Boards, handle around ten times as many cases as the ordinary courts in the first instance, the majority being judgments in default in uncontested money claims. Under current civil procedure law every dispute must be first brought to the Conciliation Board to achieve a negotiated settlement, or a judgment if the negotiation fails. This is subject to some important exceptions (including most administrative law cases as discussed above). However, the Civil Procedure Committee proposed that in any event the mandatory requirement to bring cases to the Conciliation Boards should be removed.

‘Voluntary conciliation should strengthen the role of the Conciliation Boards as conciliation bodies, and offer the best interface with other dispute resolution facilities, as well as with the rules on judicial mediation and small claims procedure before the ordinary courts.’ (Bårdsen, 2002:6)

In essence, the procedure to be adopted in the Conciliation Boards is a swift, simple and inexpensive system. A hearing would take place within three months of a complaint; legal representatives are permitted but their costs cannot be recovered from the opponent; a limited presentation of evidence can take place; each party can request for the case to be discontinued if settlement has not been agreed within three hours. If agreement is secured this will have the status of an in-court agreement (see §7-8 Dispute Act).

However, although the model of the Norwegian conciliation boards is an intriguing one, the practicality of its application has had a number of drawbacks. On the positive side: they offer a cheap and relatively fast way to solve disputes; ‘reasonable’ considerations in addition to law can inform decision making; the boards are locally based; the action *per se* of taking a case to a conciliation board is considered less conflictual than suing in the district court; the parties are less polarised and will generally meet face to face at the mediation; and the process is regulated by lay people in the community. However, on the negative side: the dispute is often not given the thorough treatment available in the courts; the lay members lack legal knowledge; the quality of decision-making varies considerably from one board to another; in most uncontested debt claims the defendant will simply not

---

<sup>32</sup> § 6-4 (Draft) Dispute Act.



show up and the board will make a default judgment (accounting for 96% of cases in 2002); the mandatory referral of debt cases to conciliation boards is frequently an obstacle to required litigation or debt collection process; board members are usually local politicians; it has been questioned whether the mandatory requirement to make a civil claim in front of a conciliation board is a breach of article 6 of the European Convention on Human Rights;<sup>33</sup> and finally, some cases are clear cases of one party failing to meet his obligations and a settlement would simply not be fair (Olsen, 2004).

‘Non-judicial mediation’ is regulated in Chapter 6, Part III of the proposed Dispute Act. The aim here is to provide an authoritative template of rules which the parties can subscribe to in order to structure such mediation but are free to withdraw from the mediation at any time. The parties will agree the appointment and process for appointing a mediator and at the parties’ request a mediator can be appointed from the Municipal Court’s panel list. The parties will be equally responsible for the mediator’s remuneration. The mediation will take place according to the following framework:

*‘§ 6-7 How the mediation takes place*

- (1) The party shall himself participate in the non-judicial mediation, or be represented by a person authorised to enter into an amicable settlement agreement.
- (2) The mediator shall adhere to the agreement of the parties as to the procedure for the non-judicial mediation, as long as this leads to it being dealt with in a proper manner.
- (3) In the absence of agreement on the procedure to be followed, the procedure shall be determined by the mediator in consultation with the parties. Meetings with the parties may be held jointly or separately. The mediation shall be impartial. The mediator shall act in an impartial manner and promote an amicable settlement. The mediator may present proposals for resolving the matter, as well as express strengths and weaknesses as to the legal and factual arguments of the parties.

---

<sup>33</sup> Incorporated into Norwegian Law in 1999. 21.5. 1999 No. 30 Lov om styrking av menneskerettighetenes stilling i norsk rett [menneskerettsloven] Act relating to the strengthening of the status of human rights in Norwegian law [The Human Rights Act].

- (4) A record shall be kept of the mediation, specifying the participants from each side. If a third party makes a statement, his identity shall be recorded. A party making a settlement offer may demand that it be recorded.
- (5) Non-judicial mediation shall be concluded by an amicable settlement being reached, by the mediator stating that further mediation is considered inexpedient or by one or both parties declaring that they do not wish further mediation. It shall be stated in the record that the mediation has been concluded.
- (6) Section 7-6(1) and (2) on prohibited evidence and duty of confidentiality following judicial mediation applies correspondingly to non-judicial mediation pursuant to this Chapter.' (Draft Dispute Act).

An agreement reached will have the same status as an ordinary out-of-court agreement.

### ***In-court mediation***

The Dispute Act enjoins the courts 'at each stage of the case' to be aware of the possibility of having the dispute resolved amicably in full or in part (7-1). There are two structures proposed for this to occur: firstly, by way of mediation in ordinary court proceedings (7-2); and secondly, via judicial mediation (7-3).

The first methodology is 'based directly on current law and practice, where the use of such informal mediation in court proceedings is extensive' (Bårdsen, 2002:7). Although the procedure will be informal, the Dispute Act does offer some structure to existing practice.

#### ***'§ 7-2 Mediation***

- (1) Mediation takes place by the court, at a court sitting or through other contact with the parties, attempting to provide a basis for an amicable settlement. During mediation the court shall not hold separate meetings with each party, nor receive information which cannot be communicated to all parties involved. The court shall not present proposals for a solution, offer advice or express points of view which may weaken the impartiality of the court.

- (2) If the parties reach agreement, the settlement may be concluded in the form of an in-court settlement pursuant to section 7-8.' (Dispute Act)

The second methodology reflects to some extent the recognition that some mediations are likely to be more intense and require more extensive procedures. A judge or other competent person will act as mediator and the question whether such judicial mediation is pursued is at the court's discretion. The mediation is undertaken in private and its content will remain confidential. The judicial mediator may suggest a solution to the dispute. If an agreement is reached this will again take the form of an in-court agreement and will be enforceable. Costs are divided equally between the parties. If no agreement results the judge mediator will not be able to act as a judge in subsequent court proceedings (unless the parties agree).

One important element of the Civil Procedure Committee's work was to evaluate judicial mediation. A pilot project on such judicial mediation was established by the Law of 6<sup>th</sup> September 1996. The project initially covered five courts of first instance and one appeal court. It was later extended to a larger number of courts of first instance. The Committee's conclusion was generally positive: a higher rate of agreement was reached than in ordinary court proceedings. For example, in the district court of Asser and Baerum, settlement was reached in around two thirds of the cases referred to judicial mediation (Bårdsen, 2002:8).

The Committee considered the ways in which judicial mediation could be strengthened. It took the view that it would not be possible to draw up a definite list of types of case suitable for mediation. Consequently, the Dispute Act provides a *discretionary* power for the case to be referred for mediation and some guidance as to the factors which might structure the exercise of that discretion:

'In giving such ruling, weight shall be attached to the attitude of the parties towards judicial mediation as well as the scope for reaching settlement or simplification of the case. Weight shall also be attached to whether judicial mediation may be inappropriate due to differences in the relative strength of the parties, the costs of judicial mediation, previous attempts at mediation or other considerations.' §7.3(2)

The procedure for judicial mediation is set out in the Dispute Act thus:

*‘ § 7-5 The proceedings of the case during judicial mediation*

- (1) Judicial mediation takes place separate from court sittings. The judicial mediator determines the procedure in consultation with the parties. Meetings with the parties may be held jointly or separately.
- (2) The parties shall during judicial mediation be present themselves or be represented by counsel.
- (3) The judicial mediator shall act in an impartial manner and promote an amicable settlement. The mediator may present proposals for resolving the matter, as well as express strengths and weaknesses as to the legal and factual arguments of the parties.
- (4) The judicial mediator determines whether, as well as the extent to, if any, presentation of evidence shall take place during judicial mediation. Presentation of evidence cannot take place without the consent of the parties as well as the consent of whoever shall present evidence or provide a statement.
- (5) The judicial mediator shall maintain a record of mediation meetings, specifying the court as well as the location of the mediation meeting, the case number, the names of the mediator, the parties and counsel, as well as whether the parties are present in person and, if applicable, who is representing them. The record shall show whether witnesses or experts have been examined, as well as their identity. A party making a settlement offer may demand that it be recorded. The record forms part of the case documents.
- (6) If the parties reach agreement, the settlement may be concluded in the form of an in-court settlement pursuant to section 7-9.'

Bårdsen concludes with a note of caution about the role of ADR generally within civil disputes:

‘Although ADR could facilitate cheaper and faster justice, ADR must not become the “poor man’ justice”, being the only practical available vessel for dispute resolution in most cases involving ordinary private parties. On the contrary, there should be work done continuously on the ordinary court proceedings, in order for

the courts to provide far more accessible and timely justice than the case is today in many European countries, both inside and outside the European Union. ADR is only one element in a deeply needed overall modernisation of the law and practice on civil procedure.' (Bårdsen, 2002:11).

## 4. Germany

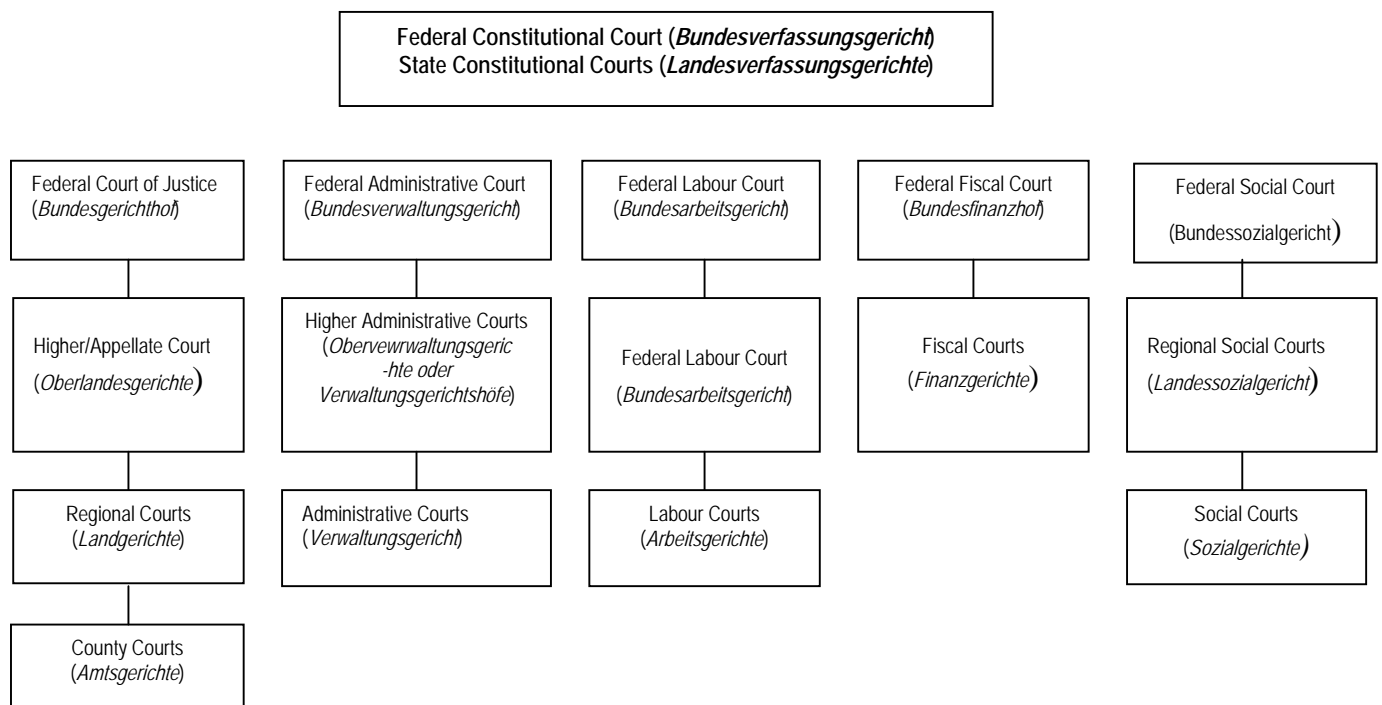
### i. Overview of court system / administrative justice

The Basic Law of 1949 (*Grundgesetz*) has moulded the fundamentals of German administrative law. Administrative law can be subdivided into general and specific administrative law. The former has been codified into the Law of Administrative Procedure 1976 (*Verwaltungsverfahrensgesetz*) and corresponding state laws. Specific or 'particular' administrative law (*Besonderes Verwaltungsrecht*) consists of the substantive law applicable to specific spheres of administrative activities. It includes the activities of the communes and other public authorities in such spheres as police, public security, social insurance, public health, welfare, housing and environmental protection.' (Schröder, 2002:95). The concepts and procedures of German administrative law are highly structured and are contained in the detailed provisions of the Law of Administrative Procedure 1976. An excellent account of these is given in Schröder (2002), consistent with the overall structure, the administrative law remedies are equally structured and categorised.

#### ***Judicial control***

There are two quite different methods of control available to secure the legality of administrative actions: administrative self-regulation and judicial control. An issue arising in respect of judicial control, in Germany as elsewhere, is the intensity of review applied by the (administrative) courts. If the administrative authority only has one alternative form of action that is termed 'bound administration' (*gebundene Verwaltung*). Wherever a person has an individual or personal right (*subjektives öffentliches Recht*) these will need to be carefully balanced. But in many cases the court will of course need discretion (*Ermessen*) to deal with the case. An overview of the court system in Germany is given in the Figure below.

**Figure 2: Organisation of Courts in Germany**



Source: Schroder (2002:132)

The Figure shows the organisation of the five branches of courts in Germany. It can be noted that State courts will apply Federal and State law whereas Federal courts can only apply Federal law. The administrative courts are separate but equal in status to the other categories of courts. A provision of the Law on Administrative Courts specifies that access to judicial forms of redress against administrative action are open for all public law disputes, except those of a constitutional nature (and therefore dealt with by the Constitutional courts) to the extent that the dispute is not designated to any of the other courts.<sup>34</sup> As can be seen from Figure 2 above there are three tiers of administrative courts. The administrative court has panels of three professional and two lay judges. The higher administrative court is an appellate court composed of three professional judges and lay judges. Each state has both courts but no more than one (appellate) higher administrative court. The latter can also act as a court of first instance, in particular with regard to administrative matters of greater importance such as the siting of a nuclear power plant or airport. The judgments of these courts will have an important impact in guiding the state administration. Finally, there is the Federal Administrative

<sup>34</sup> Section 40(1).

Court, (formerly in Berlin, now in Leipzig) composed of senates containing five professional judges. It is mainly a court of appeal but exceptionally it is a court of first (and last) instance where there is a dispute between the State and the Federation of a non-constitutional nature. The administrative law judges, like other German judges, are independent, a position strongly protected by the Basic Law. Final decisions on the impeachment of a judge will rest with the Federal Constitutional Court.

Access to an administrative court is regulated by the so-called 'general clause', i.e. section 40 of the Law on Administrative Courts, which gives a citizen the right to have any decision taken by an agent of the State that is prejudicial to him/her, challenged in an administrative court.

Court procedure is dominated by the principles of orality and expedition and can be described as inquisitorial. A decision can rarely be issued without an oral hearing and judgment can only be given by the judges who took part in the proceedings. A litigant may pursue an appeal (*Berufung*), a revision (*Revision*), or a complaint (*Beschwerde*) against the decision of the lower and higher administrative courts. The act of filing an appeal usually results in the suspension of the legal validity of the administrative act complained of. Appeals can be filed on questions of law and fact. A revision however, only allows review of legal questions.

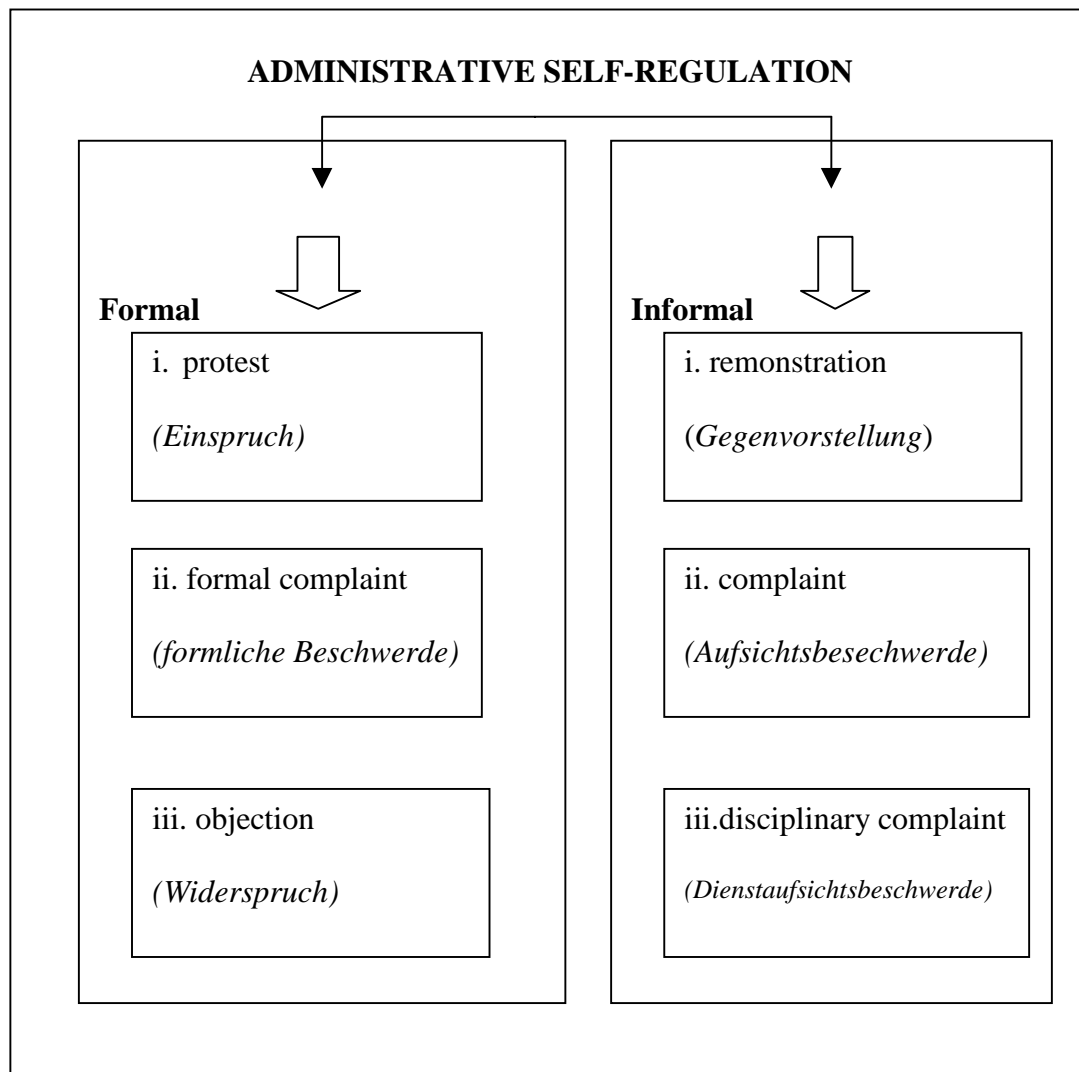
### ***Administrative self-regulation***

The second main method of securing control of the legality of administrative action is through 'administrative self-regulation'. The idea behind this concept is that the administration is allowed an opportunity to put its own house in order before access to a court is permitted. Administrative self-regulation can be either 'formal' or 'informal'. Informal self-regulation subdivides into

- i) remonstrance against a certain action,
- ii) complaint, or
- iii) disciplinary complaint to the supervisory authority to issue directives to the lower authority. See the Figure below.



**Figure 3 Administrative Self-Regulation**



Formal remedies of self-regulation are

- i) protest,
- ii) formal complaint, and
- iii) objection.

The informal remedies do not need to comply with any form but there is no 'right' to claim them. A citizen can also file a formal remedy, but this will impose a duty on the authority to decide whether the administrative action complained of was legitimate and expedient. Formal remedies i) and ii) are more or less limited to matters of financial administration.

The objection (iii) is the most important form of formal remedy within administrative self-regulation.

Once an objection is filed the public authority must then review its decision, but if this provides no redress the supervisory authority will give a ruling on the objection. This procedure, in effect, combines an internal administrative review with a pre-trial process.

‘Administrative self-regulation provides relief for the administrative courts by granting the opportunity for self-regulation before access to a court is allowed. Additionally, it extends the legal protection of individuals. It covers all directories (*Aufsichtsmaßnahmen*) with respect to legal persons of public law, e.g. the supervision of the municipal self-government.’ (Schröder, 2002:127).

An ‘objection’ has the great practical benefit of being accepted in nine out of ten cases thus precluding the need to litigate in the courts (Schröder, 2002:137).

## **ii. Ombudsman schemes**

There is no real equivalent in Germany to the Parliamentary and local government ombudsman schemes in the UK. All ten countries joining the EU in 2004 have an ombudsman at national level. Of the EU Member States, only Germany, Italy and Luxembourg do not have one, although Germany and Italy have regional ombudsmen.

There is a Parliamentary Ombudsman for the armed forces (*Wehrbeauftragter des Deutschen Bundestages*) who monitors the constitutional rights of the citizens in military service and serves as their advocate.<sup>35</sup> ‘The Parliamentary Commissioner for the Armed Forces is an institution without precedent in German constitutional history. It was conceived along the lines of the “militie-ombudsman” in Sweden.’<sup>36</sup> The ombudsman is *elected* by the *Bundestag* every five years. Every soldier has the right to take complaints directly to the ombudsman. The ombudsman handles about 6,000 complaints annually; he/she is empowered to inspect the records of all military agencies and organizations and visit any *Bundeswehr* installation without notice.

---

<sup>35</sup> Article 45b was incorporated into the Basic Law in 1956 “to safeguard basic rights and to assist the Bundestag in exercising parliamentary control over the Armed Forces. Details shall be regulated by a federal law.” The Law on the Parliamentary Commissioner for the Armed Forces was promulgated on 27 June 1957.

<sup>36</sup> For a synopsis of the office’s historical development see the *Deutsche Bundestag* website: [http://www.bundestag.de/htdocs\\_e/orga/03organs/06armforce/armfor02.html](http://www.bundestag.de/htdocs_e/orga/03organs/06armforce/armfor02.html)

The ombudsman model has been utilised more conspicuously in the private rather than public sector. For example, there is the ombudsman scheme of the German private commercial banks. One effect of this scheme has been the stimulation of in-house complaint settlement schemes within most of the private commercial banks. The service is free to bank customers and if a complainant is still not happy with the ombudsman's decision she/he can still pursue the matter through the courts. Private commercial banks undertook to accept Ombudsman decisions in cases involving amounts up to €5,000. This scheme appears to have had good public support and credibility. Perhaps one reason for this high regard is the calibre of the ombudsmen: they are former senior judges. Additionally, the procedure is quick and straightforward. A customer complaints office receives complaints which will contain brief accounts of the facts and relevant statements and other documents. The scheme, introduced in July 1992 has built up a caseload of complaints, numbering 2,807 in 2002. In that year, around 44% of admissible complaints were resolved in favour of the customer, 53% against and in 3% a compromise was reached (Banking Ombudsman 2002:3). The scheme has worked so well that the Federal Ministry of Justice has authorised the scheme to handle disputes between customers and private commercial banks about credit transfer law and the misuse of payment cards.<sup>37</sup> The scheme also supports the Consumer Complaints Network for Financial Services (FIN-NET) established by the European Commission (see section D(i) below).

### **iii. Alternative Dispute Resolution (ADR)**

Until the 1990s civil disputes were generally handled via litigation or arbitration. 'Mediation was quite rare, and its use mostly confined to the fields of divorce and environmental disputes' (Funken, 2002). Germany has embraced ADR relatively late in the day compared to some other European jurisdictions. There are a number of explanations.<sup>38</sup> There is, for example, a perception that civil litigation is a sufficiently robust and efficient form of dispute resolution which of course weakens the pressure to explore alternatives (Freshfields Bruckhaus Deringer, 2002). In general, German citizens appear to have a high regard for the independence and skill of the judiciary. Conciliation bodies do exist in Germany on a voluntary basis, for example various categories of trade

---

<sup>37</sup> This replaced a conciliation scheme set up by the *Deutsche Bundesbank* under the Prohibitory Injunctions Act.

<sup>38</sup> Alexander (1999) offers six theories to explain why mediation has been more recognised in Germany. See Funken (2002:fn 80).

disputes, doctors' associations and in respect of third party liability insurance, but apparently do not enjoy the public's support. One commentator notes that 'conciliation proceedings tend to meet with a negative legal-political and social environment in this country' (Gottwald, 1999:230).

The breakthrough of the development of ADR in Germany came in 1999 when the Federal Parliament introduced legislation which permits all 16 German states (*Länder*) to introduce mandatory court-connected mediation.<sup>39</sup> The avowed aims of this legislation are to stimulate the use of mediation as a dispute resolution method and to significantly reduce the caseload at the first instance court level (Funken, 2002:fn89). There are three categories of dispute which will qualify for mandatory mediation:

- i) financial disputes up to a value of € 750;
- ii) certain neighbourhood disputes; and
- iii) defamation disputes where the alleged defamation has not occurred through the media.

State Parliaments therefore can legislate to require participation in these cases as a necessary precondition to bringing court proceedings. Family disputes and certain other cases are expressly excepted from mandatory mediation. However, the Federal law allows each state some discretion in framing its corresponding legislation and indeed there is no compulsion to legislate at all. However, most of the states have either enacted or are drafting bills to enact suitable legislation. The first state to do so was Bavaria.

The Bavarian Mediation Law (*Bayerisches Schlichtungsgesetz*) follows the federal guideline regarding the types of disputes which will qualify for mandatory mediation. Lawyers and notaries function as mediators under this law and the judge of the High Court of Bavaria has delegated powers to create further categories of mediator. All mediators have a duty of neutrality and impartiality and a lawyer-mediator will be barred from representing any of the parties in subsequent court proceedings with regard to the same matter. The mediator convenes an oral hearing, which will be in private, and has a professional privilege against disclosing information obtained during the mediation. The law does contain a provision that will permit a mediation to occur via an exchange of

---

<sup>39</sup> See German Rules of Civil Procedure (Einführungsgesetz zur Zivilprozeßordnung or "EGZPO"), para. 15(a).

documents only in an appropriate case. Witnesses may not take part in the mediation unless both parties agree and the participation of such witnesses and experts does not unreasonably delay the mediation. The mediator has a generous control over the procedure adopted for the mediation.<sup>40</sup> The parties have a right to be accompanied by a legal representative if they so wish.

Funken (2002) argues that the focus of the Bavarian law on 'the clarification of the facts' in the mediation session indicates 'a very legalistic and evaluative understanding of mediation'. She argues that this approach in fact prevents some of the well known benefits of mediation: in particular, the relationship-saving effect and the identification of an interest-based 'win-win solution'. If the parties settle, the mediator must draw up a written record of the agreement which should include details of how the cost of the mediation will be split. If there is no agreement, the mediator issues a certificate of failure of the mediation (a procedure necessary to start formal court proceedings).

Even though the prescribed categories of dispute must be referred for mediation the Bavarian law provides that a mediator may issue a certificate of failure if s/he regards the matter as unsuitable for mediation. Funken, (2002) comments that this is decided more on the basis of practical considerations, e.g. the complexity of the case, number of witnesses, expert testimony etc, rather than on the basis of the principled question whether mediation is a suitable vehicle *per se* for dispute resolution.

Although the federal law discussed above appears somewhat limited in scope it has prompted some important changes in German legal culture. The German Bar Association now has a committee on mediation and has established training programmes and the number of dispute resolution services has increased (Freshfields Bruckhaus Deringer, 2002).

---

<sup>40</sup> Funken, (2002) notes that the research shows that lawyer-mediators 'tend to possess fairly interventionist mediation styles' in comparison to non-lawyer mediators. See Alexander (2000:88).

## 5. Europe

This section provides a brief snapshot of activity in relation to administrative law remedies at the level of the two major European-wide institutions and sources of European law, the European Union and the Council of Europe. This is followed by some brief comments about the treatment of the ombudsman principle within this institutional setting.

### i. European Union

An individual can obtain the benefit of effective judicial protection in the European legal order at two levels. At the Community level several remedies are available: the appeal on review of the legality of decisions taken by a Community institution<sup>41</sup> and the action for non-contractual liability in respect of damage caused by an EC institution.<sup>42</sup> Actions are brought before the European Court of Justice (ECJ) in Luxembourg.

At the national level, domestic courts have the task of ensuring that EC law is effectively applied and they also have the opportunity to refer preliminary questions concerning the validity and interpretation of EC law to the ECJ.<sup>43</sup>

It would appear that National administrative law is being influenced by Community law. Widdershoven concludes that ‘a common administrative law or a *Jus Commune* is gradually taking shape in Europe.’ He further comments:

‘The Europeanization of administrative law is especially the result of and is enforced by the ECJ. In its case law the Court has developed several general principles of Community law, such as the principles of proportionality, equality, defence etc, as well as the very important principle of effective judicial protection, which also includes the principles of State liability and immediate legal protection. Administrative authorities and national courts have to comply with these principles in cases where the application of Community law is at issue. This compulsory influence can be indicated as a *direct reception* of Community law influences. (Widdershoven, 2002:302).

---

<sup>41</sup> Article 230 EC.

<sup>42</sup> Article 235 EC in conjunction with 288, para 2.

<sup>43</sup> Article 234 EC.

It is argued that there is also evidence that this process of convergence is being assisted by an *indirect* reception of Community law, i.e. Europeanization via the application of Community standards in purely domestic cases.<sup>44</sup>

### ***European Commission's Green Paper***

The European Commission has produced a Green Paper (2002) consultation on ADR in civil and commercial law.<sup>45</sup> This paper draws a distinction between ADRs conducted by the court or entrusted by the court to a third party ('ADRs in the context of judicial proceedings') and ADRs used by the parties to dispute through an out-of-court procedure ('conventional ADRs'). It also draws a useful distinction between two types of 'conventional ADRs': ones where the mediator can be called upon to take a decision which is binding or make a recommendation to the parties which they are free to follow or not; and one where the mediator does not formally adopt a position on the resolution of the dispute but simply helps the parties come to an agreement.<sup>46</sup> The paper sets out the rationale for the greater use of ADRs, in particular their ability to offer solutions for cross-border disputes which have tended to result in lengthy court proceedings and high costs. Access to justice is not only a fundamental right contained in article 6 of the European Convention on Human Rights, it has also been stated by the European Court of Justice that access to valid remedies is a general principle of Community law.<sup>47</sup> The Green Paper (2002) also underlines the function of ADRs 'as a means of achieving social harmony' and its political priority for encouraging ADRs in the context of the EU's wider agenda of achieving an 'area of freedom, security and justice within the European Union.' The Green Paper (2002) notes that although the Member States do not have detailed framework regulations on ADRs, some of them have nevertheless taken sectoral initiatives to promote ADRs by creating consultative authorities (e.g. National Consultative Council on Family Mediation in France), financing ADR structures (e.g. consumer complaints boards are financed by national budgets in the Scandinavian countries) and implementing training programmes. The Green Paper (2002) contains a brief section explaining the ways in which the Member States have generally encouraged ADRs conducted by a court, or entrusted by the court to a third party.<sup>48</sup> As regards conventional

---

<sup>44</sup> Widdershoven (2002) points to the case of *M v Home Office* [1993] WLR 3 by way of illustration. The House of Lords decided that the injunctive relief against the Crown, granted in *Factortame* in relation to cases where Community law was at issue, should be extended to purely domestic cases.

<sup>45</sup> Green Paper on alternative dispute resolution in civil and commercial law. Com(2002) 196 final. [http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002\\_0196en01.pdf](http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf)

<sup>46</sup> Ibid, para 3.

<sup>47</sup> Case 222/84 Johnston [1986] ECR 1651.

<sup>48</sup> Ibid, para 2.1.1.

ADRs (i.e. out-of-court mediation), it is noted that these have not been the subject of any general regulations in the Member States, though sectoral legislation has been created in some of the Member States aimed at creating services responsible for ADRs, e.g. in Denmark, Ireland, Finland and Sweden. Finally, it is noted that the important areas of activity at the EU level have been in connection with three policy areas: consumer protection law, family law and labour law.

As regards consumer protection, the European Commission has adopted two recommendations which establish principles applicable to out-of-court procedures for the resolution of consumer disputes.<sup>49</sup> Two European networks of national bodies to facilitate access for consumers to out-of-court procedures for the resolution of cross-border disputes have also been set up.<sup>50</sup> ADRs have been the focus of attention in particular in relation to electronic commerce where 'online dispute resolution' (ODR) is starting to develop. It is clearly a strong EU policy aimed within to strengthen consumer confidence in electronic commerce and the development of ODR and 'traditional' forms of ADR is seen as a means to that end.

Family law mediation has also attracted EU attention. The action plan relating to the creation of an 'area of freedom, security and justice' approved at the Vienna European Council in December 1998 contains a provision to 'examine the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts. In this context, the possibility of mediation as a means of solving family conflicts should be examined'.<sup>51</sup> Recent Regulations<sup>52</sup> relating to the recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility have attempted to establish jurisdictional rules which identify in each case one single jurisdiction competent to decide and a system of co-operation between authorities.

ADRs are also, according to the Green Paper (2002), a 'key component of dispute settlement in industrial relations in all the Member States'. The development of such procedures has been dominated by employers and employees' representatives ('social partners').

---

<sup>49</sup> See OJ L 115, 17.4.1998, p. 31 and OJ L 109, 19.4.2001, p 56.

<sup>50</sup> 'The European Extra-Judicial Network' (EEJ-Net) and the Financial Services complaints network (FIN-NET).

<sup>51</sup> OJ C 19, 23.1.1999, p.1, para 41(c).



'Most ADRs in the field of industrial relations are organised by the social partners themselves. In the event of failure they can then have access to ADR structures offered by the public authorities. Procedures vary from one Member State to another, but they are generally voluntary as regards both the decision to go to them and the acceptance of the outcome.'<sup>53</sup>

Indeed, the European Commission is actively considering whether to extend these developments and establish European ADR facilities for transnational industrial disputes.

In conclusion, the Green Paper (2002) poses questions as to how to preserve the quality and flexibility of good ADR practice. 'In order to achieve this twofold objective, we must decide whether the approach to be followed should be sectoral or global and whether the initiatives to be taken should deal differently with ODR and traditional techniques.'<sup>54</sup> The official UK response is reflected in the following statement:

'The Government welcomed the Green Paper but urged the Commission to be cautious before attempting to introduce regulation for ADR, and concentrate instead on initiatives that encourage best practice and facilitate the use of ADR in civil disputes. The Government strongly supported the view that mediation in family matters should be dealt with separately and that a field by field approach is more suitable for the remainder of civil work.'<sup>55</sup>

Following the European Commission's Green Paper (2002), a European Code of Conduct for Mediators has been prepared.<sup>56</sup> This brief code attempts to provide a text covering the key issues of independence, impartiality, and confidentiality. The EU's involvement in 'soft law' measures has generally been welcomed by the mediation industry. However, one other follow up to the Green paper has been the issuing of a draft *directive* on mediation in 2004. According to one authoritative source:

'Many of the responses to the European Commission's 2002 Green Paper on the future of civil and commercial mediation argued in favour of the EU taking a

---

<sup>52</sup> For references, see the Green Paper (2002).

<sup>53</sup> Green Paper (2002:para 52).

<sup>54</sup> Green Paper (2002:para 54.)

<sup>55</sup> Monitoring the effectiveness of the Government's commitment to using Alternative Dispute Resolution (ADR) August 2003. <http://www.dca.gov.uk/civil/adr/adrmon03.htm>

<sup>56</sup> See <http://www.adrcenter.it/articoli/foto/codice%20di%20condotta%20europeo.pdf> for the text of the Draft.

supportive and promotional role, and that it should focus its resources on encouraging the take-up of mediation rather than moving too quickly towards direct regulation. CEDR's own submission argued strongly along these lines, and the European Parliament also signalled its support for further research, promotion and promulgation of best practices, with any legislative activity focussed solely on potential simplification of the field.

There was, therefore, some concern when the Commission announced late in 2003 that its work programme would include development of a formal directive on mediation, albeit one that was signalled as being designed to promote mediation. It may be, however, that we can now treat these concerns as premature, since the preliminary draft directive recently issued by the Directorate-General for Justice and Home Affairs does indeed bear the hallmarks of a document intended to foster growth rather than impose unwelcome regulation.' (The (British) Centre for Effective Dispute Resolution (CEDR) website May 2004).<sup>57</sup>

## **ii. Council of Europe**

### ***Recommendation on family mediation***

The Council of Europe has adopted a recommendation on family mediation (1998).<sup>58</sup> This document recommends that governments of Member States of the Council of Europe 'introduce or promote family mediation or, where necessary, strengthen existing family mediation' and take measures to implement a set of principles for these purposes. The principles set out in the recommendation include the widely recognised norm that 'mediation should not, in principle, be compulsory' and that Member States should be free to organise mediation as they see fit through the private or public sector. The independent/impartial position of the mediator is recognised and it is stated that 'the mediator has no power to impose a solution on the parties'. Again, confidentiality is respected in such mediation and States should have a role to facilitate proper legal mechanisms to approve and enforce mediated agreements.

---

<sup>57</sup> [http://www.cedr.co.uk/index.php?location=/library/articles/EU\\_draft\\_directive.htm](http://www.cedr.co.uk/index.php?location=/library/articles/EU_draft_directive.htm)

<sup>58</sup> Recommendation R (98) 1 - <http://cm.coe.int/ta/rec/1998/98r1.htm>

### ***Recommendation on alternatives to litigation between administrative authorities and private parties***

The Council of Europe also issued a recommendation on alternatives to litigation between administrative authorities and private parties in 2001.<sup>59</sup> The recommendation is based, inter alia, on the proposition 'that the large amount of cases and, in certain States, its constant increase can impair the ability of courts competent for administrative cases to hear cases in a reasonable time, within the meaning of Article 6.1 of the European Convention on Human Rights'.<sup>60</sup> It recommends that governments of Member States 'promote the use of alternative means for resolving disputes between administrative authorities and private parties by following, in their legislation and their practice, the principles of good practice contained in the Appendix to this recommendation'.<sup>61</sup> It is recognised, in the text of this Appendix, that alternative means such as internal reviews, conciliation, mediation and negotiated settlements may be used prior to or during legal proceedings, but in all cases 'the use of alternative means should allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration'.<sup>62</sup>

The explanatory memorandum to this recommendation is a particularly useful document. It contains some interesting analysis of 'situational' and 'structural' factors explaining the development of ADR specifically between the administration and private parties. It firmly places ADR as a *complement* not a substitute to court resolution. Dispute *prevention* is clearly distinguished from dispute *resolution*. Preventative processes (e.g., consultation, public enquiries, and negotiation occurring prior to the occurrence of a dispute and as part of the process of preparing the administrative act), 'encourage citizen participation in the administration's activities and provide the public with better information about them. In this way the administration becomes more accessible to the public, while also being better informed of the public's views on planned schemes'.<sup>63</sup> The memorandum also considered the question of principle whether certain disputes should solely be handled by the courts.

---

<sup>59</sup> *Recommendation R (2001) 9* (adopted 5/09/2001) on alternatives to litigation between administrative authorities and private parties.

<sup>60</sup> Ibid, para 5.

<sup>61</sup> Ibid, para 13.

<sup>62</sup> Ibid, Appendix, para 3.II.iv.

<sup>63</sup> Ibid, explanatory memo, para 55.

‘To answer this question, a distinction should be drawn between proceedings *in rem*, where the lawfulness of an administrative act is challenged, and proceedings *in personam*, which are based on infringement of rights, where the appellants complain of interference with a position that is specific to them’.<sup>64</sup>

The view taken was that in the area of rights, ‘particularly contracts, civil liability and claims relating to a sum of money’, alternative means of dispute were appropriate, though the diversity of Member States was such that they should be left with the choice of adopting alternative means generally or for only certain types of dispute. As regards proceedings *in rem*, the view was taken that ‘direct objection to an Administrative Act with a general impact by means of an application to have the Act set aside, or in some cases even supplanted by another Act, does not lend itself to alternative means, and only the courts should be authorised to wield power in that respect.’<sup>65</sup>

The Council of Europe’s project group on administrative law (CJ-DA) which did the preparatory work for the Recommendation commissioned a questionnaire for Member States to elicit their views and practices specifically on alternative means to litigation in the *administrative* sphere. The results of this survey work are given in the explanatory memorandum. There were in fact few examples of alternative methods being used generally in the administrative law sphere. Lithuania was the exception. It has recently established a general system for the extra-judicial settlement of administrative disputes. The explanatory memorandum notes the following details.

‘The system, established very recently, allows complainants - except in a few cases - to choose at the outset whether to pursue the judicial or the out-of-court method of settling their case. However, even if they opt for the latter, they always retain the right of appeal to an administrative court once the extra-judicial proceedings have ended.

168. There are two types of out-of-court settlement: a special system that exists in several branches, resembling ones in other countries, and a general system. The latter comprises three tiers of administrative disputes committees. The first tier, at the municipal level, does not yet exist

---

<sup>64</sup> Ibid, para 61.

<sup>65</sup> Ibid, para 67.

because the establishment of local committees is optional. However, the district and national committees are in permanent session. They have been established by the government for a four-year period and comprise five legal members.

169. The committees, between which there is no hierarchical relationship, have power to consider individual administrative decisions and the authorities' refusal to implement certain decisions or delays in so doing. The law specifies certain disputes which are outside their jurisdiction - such as those relating to the legality of administrative rule-making decisions - as well as cases in which these committees must be consulted before there can be a reference to the courts.
170. Committees are empowered to order departments to carry out decisions or end violations within a specified time, but implementation depends on the good will of the authorities concerned. Where a committee's decision or its implementation is in dispute the case comes before the courts.
171. The system is very recent and it is therefore too early to establish a complete picture of its strengths and weaknesses, but one advantage is that it offers a locally based service in a country with just seven administrative courts.'

### **iii. Europe and the ombudsman principle**

The Council of Europe's recommendation discussed above is also at pains to point out the relevance of ombudsmen schemes in the context of ADR methods. There are a number of Council of Europe recommendations and resolutions relating to such schemes.<sup>66</sup> It has been said that there are two main archetypes of ombudsmen systems: redress and control models (Heede, 2000). The main function of the former is to apply ADR whereas the latter's main function is to supervise state authorities, rather than the resolution of individual disputes.

'Redress model ombudsmen are created when the traditional means of redress are perceived to be insufficient.... Ombudsmen schemes adopting this model are often seen as advocates for citizens.' (Seneviratne, 2002:13).

---

<sup>66</sup> For example, Recommendation No R (85) 12; Resolution (85)8; Recommendation No R (97) 14.

However, the 'control' ombudsman is different; '[t]hese schemes are created and primarily to regulate the way standards are created and understood by a public authority.' (Seneviratne, 2002). Control ombudsmen can focus on bodies not supervised by Parliament, all public bodies, or the executive. As regards redress ombudsmen these come in two categories: the ombudsman acting to ensure legal rights are enforced, and the ombudsman providing a remedy for non-legally enforceable rights.

The European models of ombudsman schemes are generally focused on an examination of documents and on the face of it the process is somewhat distant from mediation that relies to a greater extent on face-to-face contact. However, most ombudsmen systems operate with some element of telephone or contact conciliation. There may be more scope for mediation schemes to be annexed to existing ombudsmen schemes, as is the case, for example, with the Independent Housing Ombudsman scheme in England & Wales (IHO, 2003:7-9) dealing with landlord/tenant disputes, where the Ombudsman can refer a suitable case to a mediator (Mackie, 2002).

'Mediation is particularly appropriate for neighbourhood and noise-nuisance disputes. In principle, and if properly resourced, there is no obstacle to applying mediation or indeed one of the types of adjudication referred to above to disputes about repairs, discretionary grounds for possession, alternative accommodation, and pre-trial determinations of facts and issues. The mode of ADR employed could and should be appropriate, based on such factors as the nature of the dispute, the complexity of the legal and factual issues, the parties' attitudes, and the desirability of determining a matter within certain time limits.' (IHO, 2003: para4.9).

Indeed a recent survey (Doyle, 2003) of 17 respondent services in the British and Irish Ombudsman Association revealed that 12 services used some kind of ADR process and in some of these 100% of complaints were resolved via ADR (though the respondents had different understandings of the definition of ADR). The spread of ADR methods was identified as in use, except for arbitration which only one ombudsman service used. The researcher found that nearly every service used some form of informal resolution.

'This last finding is important for several reasons: an increasing number of complaints are now being resolved through some form of informal resolution; this process remains undefined and for the most part unexplained to service users;

complainants' perceptions of fairness are affected as much by the process as by the outcome achieved, so it is important there is clarity about the process being used.' (Doyle, 2003).

Indeed, the spread of national ombudsmen has also been paralleled by the setting up of the office of a European Ombudsman, established by the Maastricht Treaty to deal with maladministration in the European Community institutions. The first European Ombudsman was elected in 1995. In the latest annual report, the European Ombudsman states:

'One of the things that distinguishes an ombudsman from a court is the possibility of mediation, which can lead to a positive-sum outcome that satisfies both parties. When the European Ombudsman finds maladministration, he looks for a friendly solution, if possible. This may involve suggesting that the institution concerned should offer compensation to the complainant, without necessarily admitting liability or setting a precedent.'<sup>67</sup>

---

<sup>67</sup> European Ombudsman: executive summary and statistics from the annual report 2003. [http://www.euro-ombudsman.eu.int/report03/pdf/en/short03\\_en.pdf](http://www.euro-ombudsman.eu.int/report03/pdf/en/short03_en.pdf)

## **6. Concluding observations**

The account given in this Report, of the profile of administrative law remedies in the Netherlands, Norway and Germany and the observations of the activities of regional European institutions, presents a diverse remedial landscape. In each jurisdiction there are distinctive mixtures of formal courts, specialised tribunals, ombudsmen schemes and ADR procedures. In each jurisdiction, it is essential that one remains aware of how these systems have evolved; their unique histories and course of development are often reflective of the distinctive socio-legal cultures which have produced them. The government's recent White Paper (2004) has presented some new ideas about how to proceed with the key tasks of preventing and resolving disputes in administrative justice. This Report provides an opportunity to reflect on some of the European approaches that may be able to shed some light on the direction and management of such reforms.

In the Netherlands, the development of the General Administrative Law Act 1994 (GALA 1994) has provided a significant example of how to achieve a comprehensive codification of administrative law. There is a strong tradition in Dutch legal culture to hear complaints informally, a view that is supported by recent research that confirms the relative unwillingness of Dutch citizens to resolve their 'justiciable' problems by going to a court or tribunal (van Velthoven, ter Voert and van Gammeren-Zoetewij, 2004). A comprehensive requirement for an administrative agency to review its own decisions has much to recommend it, and the 'notice of objection' procedure (internal review by administration) under GALA 1994 appears to provide a truly preventive dispute technique worthy of further detailed research. The pattern emerging on the use of ADR techniques is their gravitation around particular policy sectors – family, labour, consumer and commercial disputes – a finding that is replicated in other European jurisdictions.

In Norway there is also a legal culture where citizens are resistant to formal litigation in the courts. The existence of a strong Ombudsman institution has arguable precluded the need for the development of a specialist tribunal sector. It will be advantageous to monitor the implementation of the forthcoming 'Dispute Act' that will contain a new civil procedure code with a number of integral ADR features. However, it is worth recalling Bårdsen's (2002) cautionary note that ADR should not become the 'poor man's justice'.

In Germany there exists a legal culture that has a high regard for formal civil litigation. There is a highly structured system of 'judicial control' and 'administrative self-regulation'



and the development of the ombudsman principle and mediation techniques have been relatively new acquisitions. This perhaps explains why the adoption, at least in one German state, of a Federal law in 1999 which introduced mandatory, court-annexed mediation in certain cases, is showing signs of an over-legalistic approach being taken. Nevertheless, it is thought that the recent developments may yet lead the way to the introduction of further experiments in mediation.

The European Commission has identified three particular areas for the development of ADR in its Green Paper (2002) – consumer protection, family and labour law. There are also a number of initiatives underway to buttress consumer confidence in electronic commerce through new developments of ‘online dispute resolution’ (ODR). The Green Paper (2002) also poses the question raised elsewhere whether future activity on developing mediation will be guided by a global or policy sector approach. The Council of Europe has provided a number of ‘soft law’ initiatives, for example the *Recommendation* of 2001 (alternatives to litigation between administrative authorities and private parties) that promotes the greater use of ADR.

A key message that emerges from this Report is that a sound administrative law system is likely to be based upon the establishment of a number of diverse institutions and procedures, combined with convenient ‘exit’ points. Furthermore, these institutions and procedures all need to be developed sensitively to their national legal cultures and policy sectors in order that an appropriate balance between formal court, tribunal, ombudsman and ADR methodologies can be struck. The future relationships between these pillars of administrative law protection need to be carefully considered and calibrated in order to better deliver the proposed reforms in the government’s White Paper (2004).

## Bibliography

ADR Law Information Journal <http://www.adrlawinfo.com/>

Alexander, N (1999) *Wirtschaftsmediation in Theorie und Praxis*, Peter Lang: Frankfurt et al.

Alexander, N (2000) 'German Law Paves Way for Mandatory Mediation' (2000) 2(9) *ADR Bulletin* 87.

Alexander, N (2003), 'Global trends in mediation: Riding the third wave', *Global Trends in Mediation*, Centrale fur mediation, Germany, pp.1-32

Banking Ombudsman (2002), *The Ombudsman Scheme of the German private commercial banks*; Ombudsman's Report 2001/2002 (summary)  
[http://www.bdb.de/download/ombudsmann/Ombudsman\\_Report\\_2001-2002\\_Summary.pdf](http://www.bdb.de/download/ombudsmann/Ombudsman_Report_2001-2002_Summary.pdf)

Bårdsen, Armfinn (2002) 'Alternative Dispute Resolution from a Norwegian Perspective – Pilot project and upcoming reforms.'- Foredrag på seminaret "Civil Litigation in the 21<sup>st</sup> Century", København 8. juli 2002.

Blankenburg E (1999) in Zuckerman A (ed) *Civil Justice in Crisis: comparative perspectives of civil procedure*, Oxford University Press.

Brouwer J G and Schilder A E (1998) *A Survey of Dutch Administrative Law*, Ars Aequi Libri, Nijmegen.

Bugge, Hans Chr, (2002) 'Access to a national court by citizens: Norway', paper presented to 12/13 January 2002 meeting of the Avosetta Group, University of Bremen. See <http://www-user.uni-bremen.de/~avosetta/buggeaccessnorw02.pdf>

de Roo, Annie and Jagtenberg, Rob (2002) 'Mediation in the Netherlands: Past - Present – Future', (vol 6.4) *Electronic Journal Of Comparative Law*, (December 2002), <http://www.ejcl.org/64/art64-8.html>

de Waard, B and de Moor, A (2002), 'Chapter 17 Administrative Law' in Chorus, Gerver, Hondius and Koekkoek (eds.), *Introduction to Dutch Law*, Kluwer Law International 1999. [Prof de Waard has supplied me with a later electronic version of this Chapter].

Doyle, M (2003) 'The Use of ADR in Ombudsman Processes: results of a survey of the British and Irish Ombudsman Association', March 2003. Available on <http://www.bioa.org.uk/>

Freshfields Bruckhaus Deringer, (2002) 'Briefing: Alternative Dispute Resolution in Germany', February 2002.  
<http://www.freshfields.com/practice/disputeresolution/publications/pdfs/2676.pdf>

Funken, K (2002) 'Comparative Dispute Management: Court-connected Mediation in Japan and Germany' 3(2) *German Law Journal* 2002.  
<http://www.germanlawjournal.com/article.php?id=130>

- Genn H (1999) *Paths to Justice: what people do and think about going to law*, Oxford: Hart Publishing.
- Genn H and Paterson A (2001) *Paths to Justice Scotland: what people in Scotland think and do about going to law*, Oxford: Hart Publishing.
- Gottwald, P (1999) 'Civil Justice Reform: Access, Cost and Expedition. The German Perspective' in Zuckerman, A (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press.
- Green Paper (2002), *Alternative dispute resolution in civil and commercial law*. Com(2002) 196 final. See [http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002\\_0196en01.pdf](http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf)
- Heede K (2000) *European Ombudsman: redress and control at Union level*, Kluwer Law International.
- Hertogh, M (2001) 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' 23(1) *Law and Policy* 2001.
- Holmboe, M (2001), 'The Norwegian Ombudsman', Riga, June 2 2001. A paper delivered at the conference 'Implementation of the Ombudsman Institution in Latvia' available at: [http://www.nmr.lv/eng/news/docs/speech\\_Norwegian\\_ombudsman\\_office.doc](http://www.nmr.lv/eng/news/docs/speech_Norwegian_ombudsman_office.doc)
- IHO (2003) *Independent Housing Ombudsman: Annual Report and Accounts 2003*, Independent Housing Ombudsman Ltd. London.  
[http://www.ihos.org.uk/downloads/landlords/IHOS\\_Annual\\_Report\\_2003\\_Full.pdf](http://www.ihos.org.uk/downloads/landlords/IHOS_Annual_Report_2003_Full.pdf)
- Leggatt, A (2001) *Tribunals for users: one system, one service: report of the review of tribunals*, Stationery Office, London. See <http://www.tribunals-review.org.uk/>
- Mackie, K (2002) 'Developing Mediation in an Ombudsman Context' *The Ombudsman* (The Newsletter of the British and Irish Ombudsman Association) March 2002, pp 6-7.
- Ministry of Justice (1994), *English translation of the General Administrative Law Act of the Netherlands*, Ministry of Justice/Ministry of Home Affairs, The Hague, February 1994.
- Ministry of Justice (2002) *The Court System in the Netherlands*, Ministry of Justice.
- Minitrial Rules (National Arbitration Institute), (These are available in English from - <http://www.nai-nl.org/english/minitrage5.html>).
- National Ombudsman (2002), *Annual Report 2002*, (English summaries available at: <http://www.ombudsman.nl/index.html>)
- OECD (2003), *Regulatory Reform in Norway: modernising regulators and supervisory agencies*. See <http://www.oecd.org/dataoecd/26/57/2955909.pdf>

- Olsen, Lars-Jørgen Kihlberg (2004) 'Alternative Dispute Resolution -The conciliation boards in Norway: a brief overview and assessment of pros and cons', 22 May 2004, available at: <http://folk.uio.no/~larsjol/conciliation.doc>.
- Online Journal of Arbitration, Mediation, Negotiation and Complementary Dispute Resolution Techniques, Widener University School of Law, USA.
- Parliamentary Ombudsman (2001) *The Parliamentary Ombudsman for Public Administration – Norway - Annual Report 2002: Summary in English*. <http://www.sivilombudsmannen.no/eng/statisk/som.htm>
- Parliamentary Ombudsman (2002) *The Parliamentary Ombudsman for Public Administration – Norway - Annual Report 2002: Summary in English*. <http://www.sivilombudsmannen.no/eng/statisk/som.htm>
- Parliamentary Ombudsman (2003) *The Parliamentary Ombudsman for Public Administration (Norway): Information on the duties and activities of the Parliamentary Ombudsman* (brochure) <http://www.sivilombudsmannen.no/eng/statisk/som.html>
- Schröder, M (2002) 'Administrative Law in Germany' in Seerden and Stroink (eds) (2002: 91-143).
- Seerden R and Stroink F (eds) (2002) *Administrative Law of the European Union, its Member States and the United States: a comparative analysis*, Intersentia, Uitgevers Antwerpen – Groningen.
- Seneviratne M (2002) *Ombudsmen: public services and Administrative Justice*, London: Butterworths.
- Statistical Yearbook of the Netherlands (2004), Statistics Netherlands, Voorburg / Heerlen, April 2004. See <http://www.cbs.nl/en/publications/articles/general/statistical-yearbook/a-3-2004.pdf>
- Statistics Norway (2004): Official government statistics unit. See [http://www.ssb.no/english/subjects/03/05/forlik\\_en/main.html](http://www.ssb.no/english/subjects/03/05/forlik_en/main.html)
- van Velthoven, B C J, ter Voert, M J, and van Gammeren-Zoetewij M (2004) *Paths to Justice in the Netherlands*, The Hague, WODC, 2004. See summary at [http://www.minjust.nl:8080/b\\_organ/wodc/publications/obl219\\_sum.pdf](http://www.minjust.nl:8080/b_organ/wodc/publications/obl219_sum.pdf)
- White Paper (2004) *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243), July 2004, London: Stationery Office.
- Widdershoven, R (2002) 'European Administrative Law' in Seerden, R and Stroink, F (eds) (2002) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, Intersentia.
- Winsvol, L (2000) 'Norwegian courts and the administration of justice', (updated by Bård Thorsen), Ministry of Foreign Affairs, October 2000.

## **DCA Research Series No. 2/04**

### **European methods of administrative law redress: Netherlands, Norway and Germany**

This report examines the profile of administrative law remedies in the Netherlands, Norway and Germany and makes some observations about the activities of regional European institutions in this field. For each jurisdiction the report provides an overview of the administrative law system and court structure, an outline of the ombudsmen schemes and the significant developments in Alternative Dispute Resolution (ADR). The government's recent White Paper, *Transforming Public Services: Complaints, Redress and Tribunals*, has presented some new ideas about how to proceed with the key tasks of preventing and resolving disputes in administrative justice. This report provides an opportunity to reflect on some of the European approaches that may be able to shed some light on the direction and management of such reforms.

For further copies of this publication or information about the Research Series please contact the following address:

Department for Constitutional Affairs  
Research Unit  
Selborne House  
54 Victoria Street  
London SW1E 6QW

Tel: 020 7210 8520

Fax: 020 7210 0693

E-mail: [research@dca.gsi.gov.uk](mailto:research@dca.gsi.gov.uk)

<http://www.dca.gov.uk/research>